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Supreme Court of the United States

OCTOBER TERM, 1949

No. 150

ALBERT G. DICKINSON, PETITIONER,

vs.

PETROLEUM CONVEESION CORPORATION

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR CERTIORARI FILED JUNE 29, 1949.

CERTIORARI GRANTED OCTOBER 10, 1949.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1948

No.

ALBERT G. DICKINSON, PETITIONER,

vs.

PETROLEUM CONVERSION CORPORATION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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[fol. 1]

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

ALBERT G. DICKINSON, Plaintiff-Appellant,

against

ARTHUR W. RINKE, GENEVIEVE LLOYD, EARL BEATTY, THE MARINE MIDLAND TRUST COMPANY OF NEW YORK and Ernest B. Osborne, Henry C. Lovis and A. R. L. Dohme, as Stockholders' Committee of Petroleum Conversion Corporation, Defendants,

and

FRANCIS J. MULLIGAN, Public Adminstrator of the County of New York, as Administrator of the goods, chattels and credits of Fred B. Lloyd, deceased, Defendant-Appellant-Appellee,

and

PETROLEUM CONVERSION CORPORATION, Intervener,

and

E. LEWIS BURNHAM and JAMES A. VAUGHAN, et al., Interveners-Appellees

MOTION TO DISMISS APPEAL—Filed March 31, 1949

Sirs:

Please take notice that upon the annexed affidavit of Solomon Kaufman, sworn to the 2nd day of March, 1949, the undersigned will move this Court at the United States Courthouse, Foley Square, New York, N. Y., on the 7th day of March, 1949, at 10:30 A. M. or as soon thereafter as ccunsel can be heard, for an order dismissing the purported appeal of William M. Duffy, Jr., as temporary receiver of [fol. 2] Petroleum Conversion Corporation, bankrupt, on behalf of said Petroleum Conversion Corporation, in the action entitled "Albert G. Dickinson, Plaintiff, against Arthur W. Rinke, et al., defendants, Petroleum Conversion Corporation, E. Lewis Burnham and James A. Vaughan, et al, interveners," upon the following grounds: (1) that the decree appealed from dated August 3, 1948 does not adversely affect said appellant; (2) that Petroleum Conver-

sion Corporation failed to appeal within the statutory period from the decree in said action dated and filed April 10, 1947, which finally determined the rights of said Petroleum Conversion Corporation and dismissed on the merits its claims in said action insofar as is here material; (3) that said decree of April 10, 1947, as appears from its face, was entered on the motion of the attorney for Petroleum Conversion Corporation jointly with the attorney for the successful interveners E. Lewis Burnham and James A. Vaughan; (4) that Petroleum Conversion Corporation has deliberately failed to appeal from the decrees of August 3, 1948 and April 10, 1947 and has not authorized or approved said appeal by said temporary receiver; that in fact said temporary receiver, as trustee in said bankruptcy, reported that said appeal should not be prosecuted and said report was approved by order of the Referee; (5) that the attorney who signed and filed the Notice of Appeal by said temporary receiver was not authorized to act and was disqualified from acting on behalf of said temporary receiver under General Orders, Order #44 (11 U. S. C. A., § 53); (6) that William M. Duffy, Jr., as such temporary receiver, at no time secured leave to intervene in said action nor was he substituted in the place and stead of intervener Petroleum Conversion Corporation and was not a party to said action within the meaning of Rule 73 (a) and (b), F. R. C. P.; (7) that William M. Duffy, Jr., as temporary [fol. 3] receiver in bankruptcy, appointed in the District of Delaware, was without capacity to appeal on behalf of said bankrupt in this District; and for such other and further relief as to this Court may seem just and proper.

Dated, New York, March 2, 1949.

Yours, etc., Solomon Kaufman, Attorney for Plaintiff-Appellant, Office and P. O. Address: 70 Pine Street, Borough of Manhattan, New York 5, N. Y.

To: Alexander Kahan, Esq., Attorney for William M. Duffy, Jr., as Trustee in Bankruptcy of Petroleum Conversion Corporation, Bankrupt, Intervener-Appellant, 30 Broad Street, New York, N. Y. J. Harlin O'Connell, Esq., 120 Broadway, New York, N. Y. James A. Vaughan, Esq., 165 Broadway, New York, N. Y. Wickes, Riddel, Bloomer, Jacobi & McGuire, Esqs., 60 Broadway, New York, N. Y. Satterlee, Warfield & Stephens, Esqs., 49 Wall Street, New York, N. Y. John C. Sebright, Esq., 122 East 42nd Street,

New York, N. Y. Leo Kaplan, Esq., 122 East 42nd Street, New York, N. Y. Joseph A. Cox, Esq., 51 Chambers Street, New York, N. Y.

[fol. 4] UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

[Title omitted]

AFFIDAVIT OF SOLOMON KAUFMAN IN SUPPORT OF MOTION

STATE OF NEW YORK,
County of New York, ss:

Solomon Kaufman, being duly sworn, deposes and says:

1. I am an attorney for the plaintiff-appellant Albert G. Dickinson, and make this affidavit in support of the annexed application to dismiss the appeal of William M. Duffy, Jr., as temporary receiver in bankruptcy of Petroleum Conversion Corporation, bankrupt, on behalf of said Petroleum Conversion Corporation, and in opposition to [fol. 5] his motion for an extension of time to file his record on appeal and docket the appeal herein.

2. The pertinent facts are as follows: On March 25, 1938 plaintiff-appellant Albert G. Dickinson commenced an action against defendant Fred B. Lloyd and others for an accounting and discovery with respect to stock issued by Petroleum Conversion Corporation. Plaintiff's claim was dismissed after trial and on appeal the judgment was reversed and the action remanded for a new trial. (*Dickinson* v. *Rinke*, 132 Fed. (2d) 805). On December 3, 1943 and prior to the new trial Petroleum Conversion Corporation for itself, and E. Lewis Burnham and James A. Vaughan, in behalf of themselves and all of the Subscribers to certain agreements and who paid money to Arthur W. Rinke, Agent, were permitted by order based on a stipulation, to intervene and plead to the complaint. By counterclaim and cross-claim in their respective answers, said interveners sought, sofar as is here material, separately and in the alternative to recover from the plaintiff and the defendant Lloyd's estate, the sum of $87,310.28. Copies of said counterclaims are annexed hereto and marked Exhibits "A" and "B".

3. Stripped to its essentials, the Petroleum Conversion Corporation's counterclaim and cross-claim alleges that

Petroleum Conversion Corporation was a reorganization of Knox Process Corporation; that Lloyd was a Director and President of both Petroleum Conversion Corporation and Knox, and dominated the reorganization proceedings; that Knox was incorporated in 1923 to develop an oil cracking process; that by the end of 1924 it was in acute financial distress; that persons interested in the continuance of its experimental and development work determined to make funds available for such purpose and to prevent such funds from being seized by Knox creditors, the monies [fol. 6] were paid under a stock subscription agency to Arthur W. Rinke, as Agent of the Subscribers; that a total of approximately $600,000 was so paid during 1925 until the end of 1926 at which time Petroleum Conversion Corporation held its organizational meeting.

That in February of 1925 an arrangement was made whereby Dickinson would accept Knox stock at par for any monies paid by him for mechanics' liens filed against Knox's oil cracking plant; instead Dickinson through Lloyd, acquired said oil cracking plant at a mechanic's lien foreclosure sale in or about January, 1926, for the sum of $87,310.28; that no disclosure of the purchase price was made; that Dickinson demanded and received out of Rinke Agency funds, in instalments during 1926 and prior to said organization of Petroleum Conversion Corporation, the sum of $174,620.56 with interest on one-half thereof until September 7, 1926, totaling $176,245.24, and divided $87,310.28 with Lloyd; that Dickinson then transferred to Petroleum Conversion Corporation said oil cracking plant and was voted 609,600 shares, par value $5 each, of which 140,000 were to be returned to the treasury.

That $87,310.28 of the monies received out of Rinke Agency funds representing the amount over the cost of said oil cracking plant, constituted a secret and unlawful profit; that Petroleum Conversion Corporation was the equitable owner of said plant, and that 244,041 shares of Petroleum Conversion Corporation's stock issued to Lloyd, which was the subject of plaintiff's action, should be cancelled on the ground that the issuance thereof was void for want of consideration, improper evaluation and fraud.

4. It is to be observed that the "central core" of facts upon which Petroleum Conversion Corporation's claim was [fol. 7] founded is its alleged status and rights as a reor-

ganization of Knox and the fiduciary relationship of Lloyd to Petroleum Conversion Corporation and its alleged predecessor Knox Process Corporation.

5. Interveners E. Lewis Burnham and James A. Vaughan, on behalf of themselves and the other Rinke Agency Subscribers alleged a similar counterclaim and cross-claim against Dickinson and Lloyd, seeking to recover said $87,310.28, also as a secret and illegal profit.

6. By decree dated April 10, 1947 the claims of all parties including Petroleum Conversion Corporation were dismissed, except the claim of the interveners Burnham and Vaughan on behalf of themselves and all other Rinke Agency Subscribers against the plaintiff and Lloyd's estate which was sustained for the recovery not only of said $87,310.28, but for the entire sum received by Dickinson and Lloyd, to wit: $176,245.24 with interest from 1926. In contrast to the Petroleum Conversion Corporation's counterclaim, the "aggregate of operative facts" upon which the Court's determination was based was that said sum had been paid out of Rinke Agency funds in breach of the fiduciary duty of Rinke as Subscribers' trustee, in which breach Dickinson and Lloyd had participated, and pursuant to a conspiracy among Rinke, Dickinson and Lloyd to defraud said Subscribers, and that the Rinke Agency Subscribers had received nothing for said sum.

7. Said decree of April 10, 1947, entered that day, further provided for notice to the Rinke Agency Subscribers and successors to their interest, to apply to intervene and assert their respective claims against the plaintiff and [fol. 8] Lloyd's estate and for a hearing of such claims and for judgment in favor of those Rinke Agency Subscribers and their successors whose claims were allowed by the Court. This procedure was expressly designed by the trial court to follow the suggestion of this Court in *York* v. *Guaranty Trust Company*, 143 Fed. (2d) 503, on the ground that the counterclaim on behalf of the Rinke Agency Subscribers was a spurious class action under Rule 23 (a) (3), F. R. C. P. A copy of said decree is annexed hereto and made a part hereof and marked Exhibit "C".

8. The Court's attention is particularly directed to the paragraphs of said decree numbered "5", "6" and "12"

which specifically dismiss on the merits the claims of Petroleum Conversion Corporation which is the subject of its present appeal. However, no appeal was taken by Petroleum Conversion Corporation from said decree at any time. It is to be noted that said decree, as appears from the face of the decree itself, was entered on the motion of its attorney, J. Harlin O'Connell, Esq. jointly with the attorney for the successful interveners E. Lewis Burnham and James A. Vaughan. As Mr. Kahan, the attorney for the trustee contended in the court below on a motion for leave to intervene on behalf of certain preferred stockholders of Petroleum Conversion Corporation, the failure of Petroleum Conversion Corporation to appeal from said decree was deliberate. In his affidavit on said motion, sworn to March 1, 1948, at page 3 thereof, he stated that he had conferred with Mr. James A. Vaughan on December 25, 1947, and that "Mr. Vaughan stated that the corporation received a fair trial and that no appeal was taken or would be taken by the corporation for that reason; • • • ." This was not denied by Mr. Vaughan in his opposing affidavit sworn to March 8, 1948.

[fol. 9] 9. Mr. O'Connell tried the action prior to the entry of the decree of April 10, 1947 on behalf of both the Petroleum Conversion Corporation and Messrs. Burnham and Vaughan. At the conclusion of the trial a single brief was filed in behalf of both the intervener Petroleum Conversion Corporation and the interveners Burnham and Vaughan. Likewise said interveners jointly submitted proposed findings of fact and conclusions of law and left it to the Court to decide whether, if a recovery was to be had, judgment should be in favor of the corporation or Vaughan and Burnham. In other words, it was clearly satisfactory to these interveners if judgment were recovered either by Petroleum Conversion Corporation or by Messrs. Vaughan and Burnham on behalf of the Rinke Agency Subscribers.

10. Alleged members of the class were thereafter permitted to intervene and assert their claims, and after hearings with respect thereto, a decree dated and filed August 3, 1948 was entered awarding to the members of the class who had appeared, sums totaling $408,949.57 (constituting said $176,245.24 with interest from 1926). A copy of said decree is annexed hereto, made a part thereof, and marked Exhibit "D".

11. It is to be noted that the decree of August 3, 1948 in no way disposes of any of the claims of Petroleum Conversion Corporation. However, by a Notice of Appeal dated and filed Sept. 1, 1948, a copy of which is annexed hereto and marked Exhibit "E", William M. Duffy, Jr., as temporary receiver in bankruptcy of Petroleum Conversion Corporation, bankrupt, on behalf of said Petroleum Conversion Corporation, appealed from said decree of August 3, 1948 insofar as it dismissed on the merits the claims of Petroleum Conversion Corporation to the sum of $87,310.28, directed [fol. 10] judgment therefor in favor of the Rinke Agency Subscribers therein listed, and dismissed on the merits the claims of said corporation to certain shares of its stock. The Notice of Appeal was signed by J. Harlin O'Connell, Esq., as attorney, not for said temporary receiver, but for the intervener Petroleum Conversion Corporation.

12. Upon inquiry I have been informed and have found:

(1) that said William M. Duffy, Jr. was appointed receiver of Petroleum Conversion Corporation in its bankruptcy proceeding in the United States Court for the District of Delaware, on or about July 19, 1948;

(2) that no ancillary receivership was obtained in the Southern District of New York;

(3) that William M. Duffy, Jr., has at no time been substituted in place and stead of Petroleum Conversion Corporation and at no time secured leave to intervene in said action and is not a party thereto;

(4) that there had been no compliance with General Order #44 (11 U. S. C. A., §53). In fact, J. Harlin O'Connell, Esq. was disqualified from acting as attorney for the receiver by the specific provisions of said General Order, in that he had been the attorney for the bankrupt;

(5) that Petroleum Conversion Corporation did not authorize said Notice of Appeal dated Sept. 1, 1948 and in fact at no time has authorized any appeal to be taken from any of the decrees in said action;

(6) that, upon information and belief, on January 19, 1949 William M. Duffy, Jr., as trustee of Petroleum Conversion Corporation, bankrupt, reported to a meet-

ing of its creditors and to its Referee that this appeal should be abandoned, and an order in accordance with said report was duly made by the Referee. A copy thereof is annexed hereto and marked Exhibit "F".

13. The sources of my information and belief hereinabove referred to are conversations with James A. Vaughan, Esq., attorney for the Rinke Agency Subscribers and former attorney for Petroleum Conversion Corporation, and members of the office of J. Harlin O'Connell, Esq., who was [fol. 11] the attorney for Petroleum Conversion Corporation in said action.

Wherefore, it is respectfully requested that the annexed application be in all respects granted and that the motion of William M. Duffy, Jr., as trustee, etc., for an extension of time to file the record on appeal and docket the action herein be accordingly denied.

Solomon Kaufman.

Sworn to before me, this 2nd day of March, 1949. Robert A. Siebert, Notary Public in the State of New York, residing in Queens County. Queens Co. Clk's No. 2157. Reg. No. 162-S.-0. New York County Clerk's No. 1606. Commission Expires March 30, 1950.

[fol. 12] EXHIBIT "A" TO AFFIDAVIT

DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK

In Equity. 86-3666

ALBERT G. DICKINSON, Plaintiff,

vs.

ARTHUR W. RINKE, FRED B. LLOYD, GENEVIEVE LLOYD, EARLE BEATTY, The Marine Midland Trust Company of New York, and Ernest B. Osborne, Henry C. Lovis, and A. R. L. Dohme, as a Stockholders' Committee of Petroleum Conversion Corporation, Defendants,

E. LEWIS BURNHAM and JAMES A. VAUGHAN, Interveners

INTERVENER'S ANSWER, COUNTERCLAIM AGAINST PLAINTIFF ARTHUR G. DICKINSON AND CROSS CLAIM AGAINST PETROLEUM CONVERSION CORPORATION

Interveners E. Lewis Burnham and James A. Vaughan in behalf of themselves and all the subscribers to certain agreements who paid money to Arthur W. Rinke, "Agent", thereunder, (hereinafter referred to as "Rinke Agency Agreements"), who are similarly situated, by their attorney, for their answer to the complaint herein, allege as follows:

* * * * * * *

As and for a Separate and Distinct Counterclaim Against Plaintiff Albert G. Dickinson and Defendant Fred B. Lloyd and Cross-Claim Against Petroleum Conversion Corporation, Interveners Herein Allege, upon Information and Belief, as Follows:

8. The ground upon which the jurisdiction of this Court depends in the diversity of citizenship between the parties and the amount in controversy herein exceeds $3,000. exclusive of interest and costs.

9. Plaintiff Dickinson is a resident of the State of Michigan and resides in the City of Grand Rapids in the County of Kent in said State.

10. Conversion is a corporation incorporated under the [fol. 13] laws of the State of Delaware with principal office

at No. 7 West 10th Street, Wilmington, Delaware. Intervener E. Lewis Burnham is a resident of the Commonwealth of Pennsylvania and resides in Berwyn, Chester County in said Commonwealth, and intervener James A. Vaughan is a resident of the State of Connecticut and resides in Greenwich, Fairfield County in said State.

11. Conversion was incorporated under the laws of the State of Delaware on March 25, 1926 with an authorized capital consisting of 1,200,000 shares of common stock having a par value of $5. per share and held its first organization meeting on December 14, 1926.

12. Conversion was organized as a step in the reorganization of Knox Process Corporation (hereinafter, for purposes of brevity, referred to as "Knox") a Delaware corporation.

13. Said Lloyd was identified with Knox as one of its directors and its President, and was in general charge of and dominated its affairs. Lloyd was also the President and a director of Conversion from its organization on December 14, 1926 and actively engaged in the management of its affairs until October 26, 1936 during which period he was in general charge of and dominated its affairs.

14. During the early part of 1925 the financial difficulties of Knox became acute. In addition to its outstanding bond issue in the principal amount of $1,000,000. ($980,000. principal amount of which had been sold) secured by first mortgage on its letters patent and certain of its real estate, Knox had become indebted to various persons and corporations for work and labor done and materials furnished in connection with the construction of its plant at Texas City, Texas, for which said persons and corporations held liens [fol. 14] amounting to approximately $168,000., exclusive of interest and charges.

15. Lloyd, as President of Knox and the person in charge of and dominating its affairs, took steps in the early part of 1925 to finance Knox and to bring about a reorganization thereof. Beginning in or about March 1925 various persons interested in Knox, desiring that its experimental and development work should not cease, undertook to make funds available for the purpose of paying its operating expenses and liquidating or acquiring the liens filed against its Texas

City plant. Due to its financial condition it was decided not to advance such funds directly to Knox, and accordingly a subscription agency in the name of "Arthur W. Rinke, Agent" (commonly known, and hereinafter referred to, as the "Rinke Agency"), was set up, to which funds were pledged from time to time from about March 1925 until about December 1926, pursuant to the terms of certain agency agreements. The aggregate amount subscribed and paid under said agreements was approximately $600,000.

16. During the time when said funds were being paid to the Rinke Agency a plan was evolved under the direction and domination of Lloyd for the organization of Conversion and for the acquisition by it of all the assets and property of Knox. As represented to the Rinke Agency subscribers and the Knox bondholders, this plan contemplated:

(a) Liquidation of the liens or the acquisition of the liens and the subsequent acquisition of the Knox property in Texas, against which the liens had been filed, in the name of the Rinke Agency with agency funds, and the transfer of the property so acquired to Conversion in exchange for 240,000 shares of its common stock to be issued pro rata to the Rinke Agency subscribers;

[fol. 15] (b) Foreclosure of the Knox mortgage and the subsequent acquisition by Conversion of the property pledged as security thereunder (consisting of patents and ninety-three acres of land in Texas), in consideration of 350,400 shares of its common stock to be issued pro rata to the bondholders who deposited Knox interim receipts with the Bondholders Protective Committee. $876,000 principal amount of Knox interim receipts were deposited with said committee and for each $1,000 interim receipt the bondholders were to receive 400 shares of Conversion common stock.

17. Had the plan outlined above been carried out the reorganization of Knox and the acquisition of its properties by Conversion would have been a simple matter. In addition to the 240,000 shares of Conversion to which the Rinke Agency subscribers would be entitled, 350,400 shares would be required to acquire the patents and the real estate at Texas City, Texas, not subject to mechanics' liens,

through the Bondholders Protective Committee. The remaining 609,600 shares of the authorized capital stock of Conversion could then be sold at par and the proceeds used to meet the financial requirements of Conversion.

18. A reorganization pursuant to such a plan would not enable plaintiff Albert G. Dickinson (hereinafter referred to as "Dickinson") and Lloyd to acquire bonus stock or realize any cash profits. Accordingly, Lloyd and Dickinson entered into a secret arrangement whereby they planned to secure illegal and unlawful profits for themselves, in fraud of the Rinke Agency subscribers, and with knowledge on the part of Dickinson of Lloyd's fiduciary relationship with said Knox and with said Rinke Agency subscribers.

19. The scheme that was in fact adopted by Dickinson and Lloyd in connection with the said lien claims, was to [fol. 16] have the property covered by such liens sold under foreclosure and Dickinson, in accordance with arrangements previously made between him and Lloyd, became the purchaser of the property at such mechanics' lien sale for the sum of $87,310.28. Both prior and subsequent to such purchase Lloyd repeatedly assured Dickinson that he (Dickinson) was fully protected not only with respect to repayment of the amount advanced or to be advanced by Dickinson for this purpose, with interest, but also with respect to profits which would be divided between them.

20. The transfer to Conversion of all assets formerly of Knox, including the property for which Dickinson advanced $87,310.28 upon foreclosure of said liens, took place at Conversion's organization meeting on December 14, 1926. Prior thereto Dickinson had demanded and received, without the knowledge, acquiescence or consent of the Rinke Agency subscribers, out of the Rinke Agency funds, the full sum of $87,310.28 advanced by him on or about January 21, 1926, together with six per cent interest thereon. Said payment was made in instalments from time to time under directions of Lloyd, who dominated the use of the funds in said Rinke Agency, and the final instalment, with interest, was completed on September 7, 1926. In addition to the payment of said $87,310.28 with interest, to Dickinson as aforesaid, Lloyd, in furtherance of their scheme, caused an additional $87,310.28 to be paid to himself and Dickinson out of said Rinke Agency funds. This additional or "profit" payment

was made in instalments and was completed on or before December 10, 1926.

21. No disclosure was made to Rinke Agency subscribers, including the above-named interveners, that said mechanics' lien claims or, upon foreclosure thereof, the property subject to such liens, could or would be, or had been, purchased [fol. 17] for any amount less than their full face amount. In an investigation beginning the latter part of 1938 it was discovered and disclosed that Dickinson, at said lien foreclosure sale on or about December 21, 1925, purchased for $87,310.28 the property of Knox against which said mechanics' lien claims had been filed; that said amount plus interest at six per cent was repaid to Dickinson with Rinke Agency funds on or before September 7, 1926; that an additional $87,310.28, upon demand by Dickinson and by direction of Lloyd, was also paid to Dickinson and Lloyd out of the Rinke Agency funds on or before December 10, 1926, four days prior to the organization meeting of Conversion which was held on December 14, 1926. Said latter amount of $87,310.28 so paid to Dickinson and Lloyd represents a secret, unlawful and fraudulent profit to Dickinson and Lloyd.

22. Either Conversion is entitled to recover from Dickinson and Lloyd jointly and severally the said illegal and fraudulent profit of $87,310.28, or the interveners herein, for and in behalf of themselves and all other similarly situated Rinke Agency subscribers, are entitled to recover said illegal and fraudulent profit of $87,310.28 from Dickinson and Lloyd jointly and severally.

23. Upwards of one hundred individuals, including the interveners named above, subscribed to the said Rinke Agency agreements in 1925 and 1926 and paid approximately $600,000 thereunder. Said interveners subscribed to certain of said Rinke Agency agreements and paid to said Rinke, Agent thereunder, as follows: E. Lewis Burnham $15,000. James A. Vaughan $24,250.

24. The interveners above named state of their own knowledge that they first learned of the Dickinson-Lloyd fraudulent transactions herein set forth, as a result of the investigation referred to in paragraph 21 hereof.

[fol. 18] Wherefore, the interveners herein demand:

(1) That the Plaintiff's Bill of Complaint be dismissed;

(2) That this Court find and decree that said plaintiff Albert G. Dickinson and defendant Lloyd shared an illegal and fraudulent profit of $87,310.28 in connection with the purchase by said Dickinson at the sale under foreclosure of mechanics' liens above referred to;

(3) That said Dickinson and defendant Lloyd be decreed to be liable, jointly and severally, to the above-named interveners by reason of said illegal and ffaudulent profit and that said plaintiff Dickinson and defendant Lloyd be decreed, jointly and severally, to pay said sum of $87,310.28, with interest thereon, to the above-named interveners;

(4) That the said interveners may recover the costs and disbursements in this action against said Dickinson and Lloyd, jointly and severally or such one of them as shall be adjudged liable therefor, and may have judgment therefor;

(5) That said interveners may have such other and further relief as the nature of the case may require and as to this Court may seem just and proper.

(Signed) E. Lewis Burnham, James A. Vaughan.

Verified by E. Lewis Burnham, December 30, 1943.
Verified by James A. Vaughan, December 31, 1943.

[fol. 19] EXHIBIT "B" TO AFFIDAVIT

DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK

In Equity 86-366

ALBERT G. DICKINSON, Plaintiff

vs.

ARTHUR W. RINKE, FRED B. LLOYD, GENEVIEVE LLOYD, EARL BEATTY, The Marine Midland Trust Company of New York, and Ernest B. Osborne, Henry C. Lovis, and A. R. L. Dohme, as a stockholders' Committee of Petroleum Conversion Corporation, Defendants,

PETROLEUM CONVERSION CORPORATION, Intervener

INTERVENER'S ANSWER, COUNTERCLAIM AND CROSS-CLAIM

Intervener, Petrolum Conversion Corporation, (hereinafter for purposes of brevity referred to as "Conversion") by J. Harlin O'Connell its attorney, for its answer to the complaint herein, alleges as follows:

* * * * * * *

As and for a separate and distinct counterclaim against Plaintiff Albert G. Dickinson and a cross-claim against Defendant Fred B. Lloyd Conversion alleges, upon information and belief, as follows:

8. The subject matter of this counterclaim and cross-claim is the rescission and cancellation of said 244,041 shares of Conversion's common capital stock issued in three (3) certificates in the name of Lloyd, and the payment by plaintiff Dickinson and said Lloyd to Conversion of $87,310.28 representing a secret profit fraudulently acquired by them as hereinafter more particularly stated, with interest thereon.

9. Conversion was organized as a step in the reorganization of another corporation called Knox Process Corporation (herein for purposes of brevity referred to as "Knox") [fol. 20] which also was a Delaware corporation, and said Knox was organized as the result of the reorganization of another corporation called U. S. Gasoline Manufacturing

Corporation, a Virginia corporation. (The original authorized capitalization of Conversion consisted of 1,200,000 shares of common capital stock having a par value of $5.00 per share.)

10. The reorganization of U. S. Gasoline Manufacturing Corporation resulting in the organization of Knox was substantially completed in or about July, 1923. Said Knox was incorporated on May 15, 1923. Lloyd dominated such reorganization proceedings and became identified with Knox as one of its directors and its President, and continued in these capacities until Conversion was organized in 1926 and during that time he was in general charge of and dominated its affairs.

11. During the latter part of 1924 and early part of 1925 the financial difficulties of Knox became more acute and Lloyd, as its President and the person in charge of and dominating its affairs, took steps to bring about its reorganization. In connection therewith Lloyd entered into arrangements with the plaintiff Dickinson whereby they planned to secure for themselves certain secret and illegal profits and advantages in fraud of and at the expense of Conversion, the general nature of which were as hereinafter set forth.

12. Knox was indebted to various persons and corporations for work and labor done and materials furnished in connection with the construction of its plant at Texas City, Texas, for which said persons and corporations held mechanics' liens. In addition, Knox had outstanding a bond issue in the principal sum of $1,000,000.00 secured by mortgage covering certain patents owned by it and also covering certain real estate other than the real estate upon [fol. 21] which the said mechanics' lien claims existed.

13. On February 26, 1925, when the liens filed against its Texas City plant amounted to approximately $168,000.00, exclusive of interest or charges, the Board of Directors of Knox authorized delivery to plaintiff Dickinson, for the alleged use by Lloyd of Dickinson's credit standing and services, 20,600 shares of its $5.00 par value common stock or $103,000., upon acceptance of its proposals, and reserved an additional 34,600 shares all or any part thereof to be forthwith delivered to Dickinson when, as, and if he

paid out any sum for any of said liens or acquired any of said liens, the stock to be delivered at the rate of one share for each $5.00 so paid or invested by said Dickinson. Said intervener begs leave to refer to the original minutes of said meeting of said Board of Directors as if herein set forth at length.

14. The procedure that was planned by plaintiff Dickinson and Lloyd and in fact followed in connection with the said mechanics' lien claims, was to have the property covered by such liens sold under foreclosure and plaintiff Dickinson, in accordance with arrangements previously made, through Lloyd became the purchaser of the property at such mechanics' lien sale for the sum of $87,310.28 which amount had previously been arranged as the price to be offered for the property at said sale. Lloyd repeatedly assured Dickinson that he (Dickinson) was fully protected not only with respect to repayment of the amount advanced, or to be advanced, with interest, but also with respect to profits which would be divided between them. Said sum of $87,310.28 was thus advanced by plaintiff Dickinson on or about January 21, 1926.

15. Beginning in or about March 1925 various persons interested in Knox, desiring that its experimental and development work should not cease, undertook to make funds [fol. 22] available for such purposes. On account of the financial condition of Knox it was deemed undesirable to advance said funds directly to Knox, and accordingly a subscription agency, known as the "Arthur W. Rinke Agency," was set up, to which funds amounting to approximately $600,000. were pledged under subscription agreements and placed in the hands of said Arthur W. Rinke, Agent, from time to time until about December 1926.

16. During the time when such funds were being paid into the said Arthur W. Rinke Agency plans were completed by or under the direction of Lloyd for the organization of Conversion as a step in the reorganization of said Knox, and for the acquisition by Conversion of all the assets and property of Knox; and all of said assets and property were in fact transferred to Conversion in or about December 1926. In connection therewith, Lloyd and plaintiff Dickinson, in fraud of Conversion, and in fraud of the security

holders of Knox, and in fraud of the subscribers to the Arthur W. Rinke Agency, and with knowledge on the part of plaintiff Dickinson of Lloyd's fiduciary relationship with Knox, its security holders, said Rinke Agency subscribers, and Conversion, arranged to obtain secret and unlawful profits for themselves, and they did in fact, fraudulently, and in breach of said fiduciary relationship, obtain such secret and unlawful profits.

17. Prior to the transfer to Conversion of the assets formerly of Knox, plaintiff Dickinson had demanded and received, in violation of the resolution of the Board of Directors referred to in paragraph 13 hereof and without knowledge, acquiescence, or consent of the subscribers to said Arthur W. Rinke Agency, the full sum of $87,310.28 which he had advanced, as aforesaid, on or about January 21, 1926, together with interest thereon, said payment to him having been completed on or about September 7, 1926. [fol. 23] Said payment was made in installments on account from time to time during the period between January 21, 1926, and September 7, 1926, and said installment payments were made at all times upon and under the directions of Lloyd, who directed and dominated the use of the funds in said Arthur W. Rinke Agency. In addition to directing the payment of $87,310.28 to plaintiff Dickinson as aforesaid, with interest, in furtherance of their scheme caused further and additional payments aggregating $87,310.28 to be made to himself and plaintiff Dickinson out of said Arthur W. Rinke Agency funds.

18. The Board of Directors of Knox understood that the amount that would have to be paid for said mechanics' lien claims would be the full face amount of said claims, and authorized payment therefor on such basis. No disclosure was made to the Board of Directors of Knox, Knox bondholders or the subscribers of funds to the Arthur W. Rinke Agency, that said mechanics' lien claims or, upon foreclosure thereof, the property subject to said liens, could or would be purchased for any amount less than their full face amount. Conversion has learned, as hereinbefore set forth, that Lloyd in behalf of plaintiff Dickinson at foreclosure sale purchased for $87,310.28 the entire property covered by the said mechanics' lien claims; that said amount plus interest at 6% was repaid on or before September 7, 1926, to plaintiff Dickinson with funds subscribed to the

Arthur W. Rinke Agency; that an additional sum of $87,310.28, upon demand by plaintiff Dickinson and by direction of Lloyd, was paid to plaintiff Dickinson and Lloyd out of funds subscribed to the Arthur W. Rinke Agency, which latter payment was completed on December 10, 1926, four days prior to the organization meeting of Conversion which was held on December 14, 1926. Said latter amount of $87,310.28 so paid to plaintiff Dickinson and Lloyd represents a secret, unlawful and fraudulent profit to said plaintiff Dickinson and Lloyd.

[fol. 24] 19. Conversion was caused to be organized by and under the direction and control of plaintiff Dickinson and Lloyd. The incorporators and original directors thereof were dummies who acted in accordance with instructions and directions of Lloyd who dominated and controlled the organization and issuance of the stock of Conversion.

20. At the organization meeting of Conversion on December 14, 1926, Lloyd caused all of its authorized stock to be issued, purportedly in consideration of the property formerly held by Knox. The only persons lawfully entitled to receive Conversion stock were the bondholders of Knox and the persons who provided the funds that went into the Arthur W. Rinke Agency. In fact, at Conversion's organization its stock was issued as follows:

(a) 350,400 shares to Arthur W. Rinke as agent for the bondholders of Knox,

(b) 240,000 shares to Arthur W. Rinke as agent for the subscribers to said Agency,

(c) 140,000 shares to Lloyd but later turned back to Conversion as treasury stock, and

(d) the remaining 469,600 shares were issued without any valid or lawful consideration.

21. At or about the time plaintiff Dickinson acquired the property of said Knox that was sold under foreclosure of said mechanics' lien claims, Arthur W. Rinke, as agent for the Knox bondholders and as agent for the subscribers to said Agency, acquired title to the patents and other property of Knox not included in the sale under the foreclosure of the mechanics' lien claims, said patents and other property having been acquired by Rinke at a sale under a fore-

closure of the above mentioned mortgage securing the bonds of Knox.

22. The transaction by which Conversion upon its organi- [fol. 25] zation acquired the property formerly of Knox took the form of a transfer to it by plaintiff Dickinson of the property acquired by him, as aforesaid, for 609,600 shares and a transfer to it by said Rinke of the property acquired by him, as aforesaid, for 590,400 shares of Conversion common stock. The 609,600 shares directed to be issued to plaintiff Dickinson, as aforesaid, or to his nominee, included the 140,000 shares which are hereinabove recited as having been issued to Lloyd and were subsequently returned to Conversion as treasury stock, leaving 469,600 shares directed to be issued to plaintiff Dickinson, or his nominee. The issuance of said 469,600 shares of stock however, was illegal and void for the reasons hereinabove and hereinafter set forth. There was no consideration whatsoever for the issuance of said 469,600 shares. Dickinson had been fully repaid the sum of $87,310.28 which he had advanced in January, 1926, together with interest on his said advance; and Dickinson had disregarded or rejected the arrangement with the Board of Directors of Knox, hereinbove referred to, for compensation for the alleged use by Lloyd of his credit standing. Under those circumstances, Conversion was the equitable owner of the property to which Dickinson held the legal title, and he was bound in equity and in good conscience to transfer said property to Conversion upon its organization. As hereinabove set forth plaintiff Dickinson and Lloyd had received a secret, unlawful and fraudulent profit of $87,310.28 in connection with the transaction. Moreover, plaintiff Dickinson's connection with the transaction was affected by his fraud in his arrangements with said Lloyd, by which Lloyd was to receive, secretly, a part of the profits which plaintiff Dickinson expected to obtain from the transaction, said Lloyd then, to the knowledge of plaintiff Dickinson, having been President and director of Knox and in charge of its affairs. The issuance of said [fol. 26] 609,600 shares or 469,600 shares was also illegal and void because Conversion's Board of Directors made no separate valuation of the property for which said 609,600 shares or 469,600 shares were purported to be issued, and if they had made a valuation thereof, equal to the par value of the stock so pretended to be issued, such valuation would

have been grossly excessive and out of all proportion to the fair or reasonable value of said property.

23. The arrangements between plaintiff Dickinson and Lloyd referred to above by which Lloyd was to participate with Dickinson in profits arising from the financial difficulties of Knox and the organization of Conversion began during or prior to December, 1924. Under those arrangements Dickinson and Lloyd shared in the profits as partners as aforesaid, although Dickinson at all times knew of Lloyd's fiduciary position.

24. Lloyd continued to dominate and control the Board of Directors of Conversion until June, 1936. About that time Lloyd went abroad, returning in October, 1936. Upon Lloyd's return in October, 1936, following an investigation by Conversion's Board of Directors, demand was made upon him for a complete disclosure of all facts having a bearing upon any liability he might have to Conversion. Lloyd made some disclosures, but on October 26, 1936, disappeared and has not been heard from since.

25. As a result of said investigation and demands upon Lloyd, Conversion came into possession of certificates representing 244,041 shares of its originally issued common stock, evidenced by Certificate No. 1910 for 2,389 shares, all issued in the name of Lloyd, unendorsed. These certificates were found to form a part of the block of 469,600 shares hereinbefore referred to. Conversion alleges that said certificates are its property and free from the claim of any other [fol. 27] person or persons. Conversion alleges that the issuance of said 244,041 shares was void for want of consideration and because of the fraud of plaintiff Dickinson and Lloyd, and that said 244,041 shares should be cancelled.

26. Conversion further avers that it is entitled to an accounting from plaintiff Dickinson and Lloyd for the above mentioned secret and fraudulent profit of $87,310.28 and a decree that said Dickinson and Lloyd are, jointly and severally, liable to it for the repayment of said sum to it, with interest thereon, and a decree against said Dickinson and Lloyd directing said payment.

Wherefore, Conversion demands:

(1) That the plaintiff's Bill of Complaint be dismissed;

(2) That this Court find and decree that said plaintiff Dickinson and defendant Fred B. Lloyd shared in an illegal and fraudulent profit of $87,310.28 in connection with the purchase by said Dickinson at the sale referred to above under foreclosure of mechanics' liens; that said Dickinson and Lloyd be decreed to be liable, jointly and severally, to Conversion by reason of said illegal and fraudulent profit, and that said Dickinson and Lloyd be decreed, jointly and severally, to pay said sum of $87,310.28 with interest thereon, to Conversion;

3. That this Court find and decree that the three (3) certificates hereinabove described representing an aggregate of 244,041 shares of Conversion's common capital stock were issued fraudulently and illegally and that Conversion be authorized, empowered and directed to rescind and cancel same.

(4) That Conversion may recover the costs and disbursements of its action against plaintiff Dickinson and [fol. 28] Lloyd, or such one of them as shall be adjudged liable therefor, and may have judgment therefor.

(5) That Conversion may have such other and further relief as the nature of the case may require and as to this Court may seem just and proper.

Petroleum Conversion Corporation, by (Signed) Walter J. Schwenk, Secretary.

Verified by Walter J. Schwenk, Secretary, January 3, 1944.

[fol. 29] EXHIBIT "C" TO AFFIDAVIT

UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF NEW YORK

In Equity 86-366

ALBERT G. DICKINSON, Plaintiff

against

ARTHUR W. RINKE, JAMES F. EGAN, Public Administrator of the County of New York, as Administrator of the Goods, Chattels and Credits of Fred B. Lloyd, deceased, Genevieve Lloyd, Earl Beatty, the Marine Midland Trust Company of New York, and Ernest B. Osborne, Henry C. Lovis and A. R. L. Dohme, as a Stockholders' Committee of Petroleum Conversion Corporation, Defendants.

PETROLEUM CONVERSION CORPORATION, E. LEWIS BURNHAM and JAMES A. VAUGHAN, Interveners.

DECREE—April 10, 1947

The issues in this action having been brought on for trial before Honorable Vincent L. Leibell, U. S. D. J., without a Jury at the United States District Court for the Southern District of New York held at the U. S. Court House, Foley Square, New York, N. Y. on the 20th, 21st, 22nd, 24th, 28th, 29th and 30th days of November, 1944, the 1st, 4th, 7th, 8th, 11th, 12th, 13th, 14th, 15th, 27th and 28th days of December, 1944, the 4th, 5th, 6th and 11th days of January, 1945, and the 5th day of February, 1945, and plaintiff's cause of action against defendants Arthur W. Rinke, Earl Beatty and The Marine Midland Trust Company of New York having been discontinued and the defendant Gene-[fol. 30] vieve Lloyd not having been served with process herein and all other parties having appeared by counsel, and the allegations and proofs on the part of all such parties who appeared having been fully heard and considered, the Court having filed its decision and opinion herein on the 11th day of October, 1946, and having filed its Findings of Fact and Conclusions of Law on the 17th day of October, 1946, and the Court having thereafter amended its Conclusions of Law IX and X on motion of the

interveners Burnham and Vaughan on the 14th day of February, 1947,

Now on motion of J. Harlin O'Connell, attorney for defendant A. R. L. Dohme and intervener Petroleum Conversion Corporation, and James A. Vaughan, attorney for E. Lewis Burnham and James A. Vaughan interveners, it is

Ordered, adjudged and decreed, as follows:

1. That plaintiff's claim to an interest in 244,041 shares of the common stock of intervener Petroleum Conversion Corporation represented by certificates numbered 1910, 1911 and 1912, which said certificates are now on deposit with the Clerk of this Court, be and the same hereby is dismissed on the merits;

2. That plaintiff's claims to an interest in $85,000.00 of Knox Process Corporation bond receipts, in $33,500 par value Rinke Agency receipts and in 9,900 shares of U. S. Gasoline Manufacturing Corporation common stock be and the same hereby are dismissed on the merits;

3. That plaintiff's claim to an interest in 20,796 shares of common stock of intervener Petroleum Conversion Corporation formerly located in the safe deposit box of Fred B. Lloyd, deceased, at The Marine Midland Trust Company of New York, N.Y. and now [fol. 31] in the possession of defendant James F. Egan, Public Administrator of the County of New York, as Administrator of the Goods, Chattels and Credits of Fred B. Lloyd, deceased, be and the same hereby is dismissed on the merits;

4. That plaintiff's claim for an accounting against intervener Petroleum Conversion Corporation has been considered and that nothing has been found due plaintiff;

5. That the intervener, Petroleum Conversion Corporation has no right, title or interest in or to the aforementioned three certificates numbered 1910, 1911 and 1912 for 244,041 shares of stock of the Petroleum Conversion Corporation now on deposit with the Clerk of this Court and the corporation's claim thereto is dismissed on the merits, and that said certificates of stock be delivered by the Clerk of this Court to the

Petroleum Conversion Corporation and that said corporation shall issue new certificates in the proper number and amount to the stockholders of U. S. Gasoline Manufacturing Corporation, described in the agreement between Fred B. Lloyd and U. S. Gasoline Manufacturing Corporation dated May 22, 1923, and listed in the Lloyd deed of trust, dated April 9, 1928, or to their legal representatives and assigns; that any shares of stock which for any reason shall not be distributed to the U. S. Gasoline Manufacturing Corporation stockholders entitled thereto within six months from the date of the entry of this decree, unless such time be extended by an order of this Court, shall be redeposited with the Clerk of this Court by intervener [fol. 32] Petroleum Conversion Corporation, subject to the further order of this Court as to the final disposition of such undistributed shares; and that this Court retain jurisdiction of this action for the purpose of supervising and controlling the distribution of said shares to the U. S. Gasoline Manufacturing Corporation stockholders, or to their legal representatives and assigns, entitled thereto and for the purpose of determining the final disposition of such undistributed shares as may hereafter be redeposited with the Clerk of this Court as hereinabove provided;

6. That the claim of intervener Petroleum Conversion Corporation to 20,796 shares of Petroleum Conversion Corporation common stock now in possession of the Public Administrator of the County of New York is sustained and allowed to the extent of 8,200 shares represented by certificates numbered 0-13696, 0-2432, 0-2433, 1224, 3283, 0-10891, 10892, 10893, 10894, 10895, 10896, 10897, 10898, 3277, 3278, 0-10839, 10840, 10841, 10842, 10843, 0-10844 to 0-10878 inclusive and 0-10789 to 10890 inclusive, 3279, 3280 and 3229 and that the claim of intervener Petroleum Conversion Corporation for the delivery and cancellation of the remaining balance of said 20,796 shares, to wit: 12,596 shares, be and the same hereby is dismissed on the merits;

7. That defendant James F. Egan, Public Administrator of the County of New York, as Administrator of the Goods, Chattels, and Credits of Fred B. Lloyd,

[fol. 33] deceased, be and he hereby is directed to deliver to intervener Petroleum Conversion Corporation 8,200 shares of the common stock of Petroleum Conversion Corporation represented by certificates numbered 0-13696, 0-2432, 0-2433, 1224, 3283, 0-10891, 10892, 10893, 10894, 10895, 10896, 10897, 10898, 3277, 3278, 0-10839, 10840, 10841, 10842, 10843, 0-10844 to 0-10878 inclusive and 0-10789 to 10890 inclusive, 3279, 3280 and 3229;

8. That the claim of intervener Petroleum Conversion Corporation for a rescission on the ground of fraud of the settlement agreement of January 6, 1938 entered into between intervener Petroleum Conversion Corporation and plaintiff Albert G. Dickinson and his son H. Randel Dickinson, is dismissed for the reason that said claim was not among the issues tried in this case;

9. That the claim of the defendant James F. Egan, Public Administrator of the County of New York, as Administrator of the Good-, Chattels and Credits of Fred B. Lloyd, deceased, to the 244,041 shares of common stock of intervener Petroleum Conversion Corporation represented by certificates numbered 1910, 1911 and 1912, now on deposit with the Clerk of this Court, be and the same hereby is dismissed on the merits;

10. That the claim of the defendant James F. Egan, Public Administrator of the County of New Yor' as Administrator of the Good-, Chattels and Credits of [fol. 34] Fred B. Lloyd, deceased, to $85,000 par value of Knox Process Corporation bond receipts, to $33,500 par value of Rinke Agency receipts and to 9,900 shares of common stock of U. S. Gasoline Manufacturing Corporation, be and the same hereby is dismissed on the merits;

11. That the claim of James F. Egan, Public Administrator of the County of New York, as Administrator of the Goods, Chattels and Credits of Fred B. Lloyd, deceased, to 20,796 shares of common stock of intervener Petroleum Conversion Corporation formerly in the safe deposit box of Fred B. Lloyd, deceased, at The Marine Midland Trust Company, New York, New

York, and now in the possession of said Public Administrator, be and the same hereby is allowed and sustained to the extent of 12,596 shares represented by certificates numbered 0-15434, 0-14142, 3663, 3664, 3665, 3666, 3668, 3689, 0-980, 981, 989, 1149, 1150, 1853, 3251, 3253, 3254, 975, 976, 977, 0-12448, 10701, 10702, 0-14552, 0-11948, 0-3386, 0-11619, 0-14535, 0-14323, 0-13491, 0-12906, 0-13994, 13995, 13996, 13997, 13998, 13999, 0-13375, 0-6137, 0-14225, 0-14096, 3002, 3003, 3005, 3010, 0-6788, 0-13481, 0-13930, 4374, 0-3780, 0-12887, 0-6752, 13713, 0-6753, 0-6966, 0-13929, 0-10932, 0-13083, 13085, 16377, 16378, 16379, 16380, 16391, 16382 and 13084, and that the claim of James F. Egan, Public Administrator of the County of New York, as Administrator of the Goods, Chattels and Credits of Fred B. Lloyd, deceased, [fol. 35] to the balance of said 20,796 shares to wit, 8,200 shares, be and the same hereby is dismissed on the merits;

12. That intervener Petroleum Conversion Corporation is not entitled to recover the sum of $87,310.28 from plaintiff, Albert G. Dickinson, and its claim thereto is dismissed on the merits;

13. That the claim of interveners, James A. Vaughan and E. Lewis Burnham, in behalf of themselves and all other Rinke Agency subscribers, against plaintiff, Albert G. Dickinson and against defendant James F. Egan, Public Administrator of the County of New York, as Administrator of the Goods, Chattels and Credits of Fred B. Lloyd, deceased, jointly and severally, for the recovery of $174,620.56 together with the sum of $1,624.68 with interest as follows:

On $10,000.00 from January 25, 1926;
On $10,000.00 from March 8, 1926;
On $10,000.00 from March 22, 1926;
On $10,000.00 from April 6, 1926;
On $..,000.00 from April 20, 1926;
On $10,000.00 from May 13, 1926;
On $20,000.00 from August 24, 1926;
On $5,310.28 from September 7, 1926;
[fol. 36] On $1,624.68 from September 7, 1926;
On $15,000.00 from September 14, 1926;
On $15,000.00 from September 28, 1926;

On $30,000.00 from October 11, 1926;
On $27,310.28 from December 10, 1926;

fraudulently paid to said Dickinson and Lloyd out of funds of the Rinke Agency between January 25th and December 10, 1926, is sustained;

14. That immediately after the entry of this decree notice in writing be given by interveners Burnham and Vaughan to all members of the group of Rinke Agency subscribers, and Rinke Agency receipt holders who surrendered their receipts to the Corporation Trust Company in November, 1937 and thereafter, or to their respective transferees, nominees, assigns and legal representatives, to apply to intervene herein and assert their respective claims against plaintiff, Albert G. Dickinson, and defendant James F. Egan, Public Administrator of the County of New York, as Administrator of the Goods, Chattels and Credits of Fred B. Lloyd, deceased, based on the fraudulent payment to said Dickinson and Lloyd of the sum of $174,620.56 and the sum of $1,624.68 (interest) between January 25th and December 10, 1926; that said notice shall be sent [fol. 37] by registered mail postpaid to each Rinke Agency subscriber and receipt holder at the address given at the time of the surrender of his or her Rinke Agency receipt to the Corporation Trust Company or at such other or better address which may appear in the records of intervener Petroleum Conversion or the records of said Rinke Agency available to said interveners or otherwise available; said notice shall fully advise each Rinke Agency subscriber and receipt holder of his or her rights under this decree and shall enclose a form of claim and application to intervene herein and to assert said claim, in accordance with the provisions of this decree, to be signed by each Rinke Agency subscriber and receipt holder, or their respective transferees, nominees, assigns and legal representatives, and said notice shall set forth instructions to file said claim and application to intervene herein with the Clerk of this Court within four months from the date of the entry of this decree; that after the expiration of said four months' period a hearing be held in this Court on notice to plaintiff Albert G. Dickinson, defendant James F. Egan, Public Administrator of the

County of New York, as Administrator of the Goods, Chattels and Credits of Fred B. Lloyd, deceased, intervener Petroleum Conversion Corporation and interveners E. Lewis Burnham and James A. Vaughan, and such Rinke Agency subscribers and receipt holders as shall have filed claims and applied for leave to intervene herein as hereinabove provided, at which time this Court will pass upon said claims and will direct the [fol. 38] entry of judgment against plaintiff Albert G. Dickinson and James F. Egan, Public Administrator of the County of New York, as Administrator of the Goods, Chattels and Credits of Fred B. Lloyd, deceased, in favor of those Rinke Agency subscribers and receipt holders filing claims whose claims are allowed by this Court; and that this Court retain jurisdiction of this action for the purpose of passing upon said claims in the manner hereinabove provided;

15. That the taxation of costs in this case and the entry of judgment therefor, be deferred until the entry of judgment in respect to the matters hereinabove reserved for the future determination of this Court;

16. That the claims of the interveners, James A. Vaughan and E. Lewis Burnham, in behalf of themselves and all other Rinke Agency subscribers against plaintiff Albert G. Dickinson and defendant James F. Egan, Public Administrator of the County of New York, as Administrator of the Goods, Chattels and Credits of Fred B. Lloyd, deceased, for the recovery of the sum of $174,620.56 and the sum of $1,624.68 with interest are not barred by any Statute of Limitations, or by laches.

Dated, New York, N.Y. April 10, 1947.

(Sgd.) Vincent L. Leibell, United States District Judge.

[fol. 39] EXHIBIT "D" TO AFFIDAVIT

In Equity 86-366

UNITED STATES DISTRICT COURT,
Southern District of New York:

ALBERT G. DICKINSON, Plaintiff,

against

ARTHUR W. RINKE, JAMES F. EGAN, Public Administrator of the County of New York, as Administrator of the Goods, Chattels and Credits of Fred B. Lloyd, deceased, Genevieve Lloyd, Earl Beatty, The Marine Midland Trust Company of New York, and Ernest B. Osborne, Henry C. Lovis and A. R. L. Dohme, as a Stockholders' Committee of Petroleum Conversion Corporation, Defendants

PETROLEUM CONVERSION CORPORATION, E. LEWIS BURNHAM and JAMES A. VAUGHAN, Interveners

FINAL DECREE

The decree herein dated the 10th day of April, 1947, in part provides:

"13. That the claim of interveners, James A. Vaughan and E. Lewis Burnham, in behalf of themselves and all other Rinke Agency subscribers, against plaintiff, Albert G. Dickinson and against defendant James F. Egan, Public Administrator of the County of New York, as Administrator of the Goods, Chattels and Credits of Fred B. Lloyd, deceased, jointly and severally, for the recovery of $174,620.56 together with the sum of $1,624.68 with interest as follows:

On $10,000.00 from January 25, 1926;
On $10,000.00 from March 8, 1926;
On $10,000.00 from March 22, 1926;
[fol. 40] On $10,000.00 from April 6, 1926;
On $12,000.0 from April 20, 1926;
On $10,000.00 from May 13, 1926;
On $20,000.00 from August 24, 1926;
On $5,310.28 from September 7, 1926;
On $1,624.68 from September 7, 1926;

On $15,000.00 from September 14, 1926;
On $15,000.00 from September 28, 1926;
On $30,000.00 from October 11, 1926;
On $27,310.28 from December 10, 1926;

fraudulently paid to said Dickinson and Lloyd out of funds of the Rinke Agency between January 25th and December 10, 1926, is sustained:

"14. That immediately after the entry of this decree notice in writing be given by interveners Burnham and Vaughan to all members of the group of Rinke Agency subscribers, and Rinke Agency receipt holders who surrendered their receipts to the Corporation Trust Company in November, 1937 and thereafter, or to their respective transferees, nominees, assigns and legal representatives, to apply to intervene herein and assert their respective claims against Plaintiff, Albert G. Dickinson, and Defendant James F. Egan, Public Administrator of the County of New York, as Administrator of the Goods, Chattels and Credits of Fred B. Lloyd, deceased, based on the fraudulent payment to said Dickinson and Lloyd of the sum of $174,620.56 and the sum of $1,624.68 (interest) between January 25th and December 10, 1926; that said notice shall be sent by registered mail postpaid to each Rinke Agency subscriber and receipt holder at the address given at the time of the surrender of his or her Rinke Agency receipt to the Corporation Trust Company or at such other or better address which may appear in the records of intervener Petroleum Conver- [fol. 41] sion Corporation or the records of said Rinke Agency available to said interveners or otherwise available; said notice shall fully advise each Rinke Agency subscriber and receipt holder of his or her rights under this decree and shall enclose a form of claim and application to intervene herein and to assert said claim, in accordance with the provisions of this decree, to be signed by each Rinke Agency subscriber and receipt holder, or their respective transferees, nominees, assigns and legal representatives, and said notice shall set forth instructions to file said claim and application to intervene herein with the Clerk of this Court within four months from the date of the entry of this decree;

that after the expiration of said four months' period a hearing be held in this Court on notice to Plaintiff Albert G. Dickinson, Defendant James F. Egan, Public Administrator of the County of New York, as Administrator of the Goods, Chattels and Credits of Fred B. Lloyd, deceased, Intervener Petroleum Conversion Corporation and Interveners E. Lewis Burnham and James A. Vaughan, and such Rinke Agency subscribers and receipt holders as shall have filed claims and applied for leave to intervene herein as hereinabove provided, at which time this Court will pass upon said claims and will direct the entry of judgment against Plaintiff Albert G. Dickinson and Defendant James F. Egan, Public Administrator of the County of New York, as Administrator of the Goods, Chattels and Credits of Fred B. Lloyd, deceased, in favor of those Rinke Agency subscribers and receipt holders filing claims whose claims are allowed by this Court; and that this Court retain jurisdiction of this action for the purpose of passing upon said claims in the manner hereinabove provided;

"15. That the taxation of costs in this case and the entry of judgment therefor, be deferred until the entry [fol. 42] of judgment in respect to the matters hereinabove reserved for the future determination of this Court;"

and notice in writing having been given by Interveners E. Lewis Burnham and James A. Vaughan to each of the members of the group of Rinke Agency subscribers, and Rinke Agency receipt holders who surrendered their receipts to the Corporation Trust Company in November, 1937 and thereafter, and/or to their known transferees, nominees, distributees, assigns and legal representatives respectively, to apply to intervene herein and assert their respective claims as provided in said decree dated the 10th day of April, 1947, and certain Rinke Agency subscribers and receipt holders, or their respective transferees, nominees, distributees, assigns and legal representatives hereinafter listed having applied to intervene and claim herein and having prosecuted their respective claims in proceedings before the Honorable Vincent L. Leibell, U. S. District Judge, without a Jury, in the U. S. District Court for the Southern District of New York, at the U. S. Court

House, Foley Square, New York, N. Y. on various dates between the 19th day of January, 1948 and the 2nd day of March, 1948, in which proceedings testimony and exhibits were received, and the Court having filed its decision and opinion and its Findings of Fact and Conclusions of Law herein dated the 24th day of July, 1948, and the issues reserved in the decree herein dated the 10th day of April, 1947 having been determined; and the interest on the items totalling $176,245.24, mentioned in paragraph 13 of the decree of April 10, 1947, having been calculated from the dates mentioned therein to August 3, 1948 as $252,704.33, resulting in a total sum of $408,949.57, of which said total sum the interveners hereinafter listed are entitled pro rata to the amounts for which they are separately awarded judgment in paragraph 1 of this decree;

Now, on motion of Wickes, Riddell, Bloomer, Jacobi & McGuire, attorneys for Cornelius R. Agnew, Executor of the Estate of George B. Agnew, deceased, and Thomas R. Williams, Executor of the Estate of Robert H. Neilson, deceased, claimants herein; on motion of Satterlee, War- [fol. 43] field & Stephens, attorneys for Marshall P. Slade, claimant herein; on motion of John C. Sebright, attorney for Edna D. Goodrich, Administratrix of the Estate of Andrew M. Outerson, claimant herein, and on motion of James A. Vaughan, attorney for E. Lewis Burnham and James A. Vaughan, interveners, and attorney for each of the other intervener-claimants herein listed below (except Jerome I. Golinko proof of whose claim herein was received subject to certain general objections), it is,

Ordered, adjudged and decreed:

1. That each intervener-claimant hereinafter listed recover of plaintiff, Albert G. Dickinson, and of defendant, Francis J. Mulligan, the Public Administrator of the County of New York, as Administrator of the Good-, Chattels and Credits of Fred B. Lloyd, deceased, jointly and severally, the amounts set opposite their respective names, and that they have execution therefor, as follows:—

Cornelius R. Agnew, Executor of the Estate of George B. Agnew, deceased	$41,768.70
Walter J. Bagshaw	7,309.53

William B. Long and Edward C. Bradlee, Trustees under Bayley-Long Indenture of Trust dated December 14, 1939	2,610.55
Walter S. Becker	1,461.91
Norman A. Boyd	2,610.55
Clyde W. Buhoup	313.26
E. Lewis Burnham	15,663.28
Lewis A. Wald	313.26
Industrial Trust Company, of Providence, Rhode Island, as surviving Executor of the Will of George H. Cahoone, and Industrial Trust Company and Edna Hamilton Cahoone as Trustees of the Will of George H. Cahoone, deceased	10,443.19
Atherton Clark	7,048.48
George Morrison Coates, Executor of the Estate of Joseph H. Coates, deceased	2,610.55
Agnes Cooke	2,610.55
[fol. 44] Franklin Dexter, Executor of the Estate of Gordon Dexter, deceased	10,442.19
Arthur J. Dickey	1,566.33
Alfred R. L. Dohme	26,105.47
Helen Prentiss Dunn	1,044.22
John Walter Dunn	1,044.22
John Walter Dunn and Helen Prentiss Dunn, heirs and next of kin of Helen Margaret Dunn, deceased, sole legatee of Walter M. McFarland, deceased	2,088.44
Roland I. Dunn, a distributee of the Estate of Homer A. Dunn, deceased	31,326.57
Charles W. Fairfax	1,044.22
John J. Friesleben	1,044.22
Charles B. Going	1,044.22
Jerome I. Golinko	104.42
Mrs. Anna Haile	208.84
Bert R. Haile	208.84
George Edward Haufler, Executor of the Estate of Elizabeth C. Haufler, deceased, transferee of George F. Haufler	522.11
Fidelity-Philadelphia Trust Company Executor of the Estate of S. Cooke Ingraham, deceased, transferee, inter alia.	1,566.33
Charles I. Jackson, a transferee of Edgar L. Jackson in the amount of $2,000.00	2,088.44

Harvey W. Jackson, a transferee of Edgar L. Jackson in the amount of $2,000.00	2,088.44
Evelyn J. Mitchell, a transferee of Edgar L. Jackson in the amount of $500.00	522.11
Morris W. Johnson	156.63
Smith Keighley	783.17
Elmira M. Deighton, Executor and Trustee u/w of William C. Keyworth, deceased	313.26
Maud M. Killeen, transferee of Louis W. Killeen, deceased	3,132.65
[fol. 45] Mary P Koppitz, Executor of the Estate of Carl G. Koppitz, deceased	12,021.05
Margery J. Lord	2,610.55
Claude H. Edgerton, Dorothy N. Edgerton and Ruth Nichols, Executors of the Estate of Henry C. Lovis, deceased	7,831.64
Claude H. Edgerton, Dorothy N. Edgerton and Ruth Nichols, Executors of the Estate of Henry C. Lovis, deceased, a transferee of Robert J. Seabury in the amount of $625.	652.64
Dorothy N. Edgerton and Ruth Nichols, Executors of the Estate of Evelyn A. Nichols, deceased, a transferee of Robert J. Seabury in the amount of $625	652.64
Dorothy N. Edgerton and Ruth Nichols, sole legatees under the Last Will and Testament of Gertrude H. Leach, deceased, a transferee of Robert J. Seabury in the amount of $625.	652.63
Genevieve Peoples McFern, transferee of Leon E. McFern	1,044.22
John A. McKennan	1,044.22
Susan R. Macy, Executor of the Estate of Clarence A. Macy, deceased and transferee of Clarence A. Macy	522.11
Lewis S. Milner	1,044.22
Thomas R. Williams, Executor of the Estate of Robert H. Neilson, deceased	2,088.44
Edna D. Goodrich (formerly Edna D. Outerson) administratrix and sole heir of the Estate of Andrew M. Outerson, deceased	1,566.33
Christopher L. Perison, Executor of the Estate of Walter Peirson, deceased	20,884.38

The Morristown Memorial Hospital, a transferee of Charles B. Reynolds in the amount of $14,000.00	14,619.06
John D. Richards	1,044.22
Ruth Richey Rouzie, sole legatee and executrix of the Estate of William E. Richey	522.11
John P. Roger	104.42
Max E. Sanders	522.11
Homer E. Sargent	3,132.66
[fol. 46] Industrial Trust Company of Providence, Rhode Island, Executor of and Trustee under Will of William P. Sargent, deceased	20,884.38
Frank Senior	208.84
Rhode Island Hospital Trust Co., Trustee under the Will of George F. Siddall, deceased	1,566.33
Marshall P. Slade	10,442.19
Bruce M. Stannard	2,610.55
Edwin A. Stevens, Jr.	7,518.37
Winton H. Church, one of the Executors of the Will of Thomas R. Stone, deceased, Assignee of Nettie Stone	104.42
Winton H. Church, one of the Executors of the Will of Thomas R. Stone, deceased	939.80
Harmon W. Tanner, transferee of Lewis H. Tanner	5,221.10
Charles E. Titchener	11,486.41
Charles E. Titchener, assignee of F. L. Titchener	5,221.10
Brooklyn Trust Company, Executor of the Estate of Winthrop M. Tuttle, deceased	28,193.91
The Travelers Bank and Trust Co., Trustee under "The Charles Coit Tyler Annuity Trust"	15,663.28
James A. Vaughan	25,322.31
William E. Wardle	522.11
Ella Keats Whiting, Fanny Whiting Myer, and John K. Whiting, Jr., Executors of the Estate of John K. Whiting, deceased	14,619.06
W. Howard Yeager	46.99
Efrem Zimbalist	1,044.22
Harry B. Zimmerman	1,566.33

2. That each Rinke Agency subscriber, has legal representatives, successors and assigns, to whom notice of the

right to intervene in this proceeding was mailed pursuant to the order of this Court and who did not apply to intervene and prosecute his claim herein, is barred from hereafter asserting any claim against the plaintiff, [fol. 47] Albert G. Dickinson, or the Estate of Fred B. Lloyd, deceased, based on any Rinke Agency subscription.

3. That the issues reserved in the decree herein dated the 10th day of April, 1947, having been determined by the Court in its decision and opinion and its Findings of Fact and Conclusions of Law filed herein dated the 24th day of July, 1948, the said decree is hereby made final.

4. That Interveners E. Lewis Burnham and James A. Vaughan are entitled to a single bill of costs and execution therefor against Plaintiff Albert G. Dickinson and Defendant Francis J. Mulligan, the Public Administrator of the County of New York, as the Administrator of the Goods, Chattels and Credits of Fred B. Lloyd, deceased, jointly and severally.

Dated, New York, N. Y., August 3rd, 1948.

(Sgd.) Vincent L. Leibell, United States District Judge.

[fol. 48] EXHIBIT "E" TO AFFIDAVIT

E-86-366

UNITED STATES DISTRICT COURT,
Southern District of New York:

ALBERT G. DICKINSON, Plaintiff,

against

ARTHUR W. RINKE, JAMES F. EGAN, Public Administrator of the County of New York, as Administrator of the Goods, Chattels and Credits of Fred B. Lloyd, deceased, Genevieve Lloyd, Earl Beatty, the Marine Midland Trust Company of New York, and Ernest B. Osborne, Henry C. Lovis and A. R. L. Dohme, as a Stockholders' Committee of Petroleum Conversion Corporation, Defendants.

PETROLEUM CONVERSION CORPORATION, E. LEWIS BURNHAM and JAMES A. VAUGHAN, Interveners

NOTICE OF APPEAL

SIRS:

Please Take Notice: that William M. Duffy, Jr., as temporary receiver in bankruptcy of Petroleum Conversion Corporation, bankrupt, on behalf of said Petroleum Conversion Corporation, an intervener herein, hereby appeals, upon the law and upon the facts, to the United States Circuit Court of Appeals for the Second Circuit as follows:

From so much of a decree entered in the above entitled action on August 3, 1948, as is set forth in paragraphs "1" and "3" thereof:

1. In so far as it dismisses on the merits the claim of intervener, Petroleum Conversion Corporation to the sum [fol. 49] of $87,310.28 and directs judgment therefore in favor of the several Rinke Agency subscribers therein listed.

2. And in so far as it dismisses on the merits the claim of intervener, Petroleum Conversion Corporation, to 244,041 shares of its common stock, represented by certificates numbered 1910, 1911, 1912 and directs the issuance of

said shares to stockholders of United States Gasoline Manufacturing Corporation.

3. And in so far as it dismisses on the merits the claim of intervener Petroleum Conversion Corporation to the remaining 12,596 shares out of a block of 20,796 shares of its common stock and allows the claim thereto of James F. Egan, Public Administrator, of the County of New York, as administrator of the goods, chattels and credits of Fred B. Lloyd, deceased.

Dated: New York, N. Y., September 1, 1948.

Yours, etc., J. Harlin O'Connell, Attorney for Intervener Petroleum Conversion Corporation, 120 Broadway, New York 5, N. Y.

To: James A. Vaughan, Attorney for Interveners, E. Lewis Burnham and James A. Vaughan et al., 165 Broadway, New York 6, N. Y. Samuel Hershenstein, Esq., Attorney for Plaintiff, Albert G. Dickinson, 70 Pine Street, New York 5, N. Y. Joseph A. Cox, Esq., Attorney for James F. Egan, Public Administrator, etc., 51 Chambers Street, New [fol. 50] York 7, N. Y. J. Harlin O'Connell, Esq., Attorney for Defendant, A. R. L. Dohme, 120 Broadway, New York 5, N. Y. Ernest B. Osborne, Esq., pro se, 210 East 68th Street, New York 21, N. Y. Wickes, Riddell, Bloomer, Jacobi & McGuire, Attorneys for Cornelius R. Agnew, Executor of the Estate of George B. Agnew, deceased, and Thomas R. Williams, Executor of the Estate of Robert H. Neilson, deceased, 60 Broadway, New York 4, N. Y. Satterlee, Warfield & Stephens, Attorney for Marshall P. Slade, 49 Wall Street, New York 5, N. Y. John C. Sebright, Esq., Attorney for Edna D. Goodrich, Administratrix of the Estate of Andrew M. Outerson, deceased, 111 Broadway, New York 6, N. Y. Leo Kaplan, Esq., Attorney for Jerome I. Golinko, 122 East 42nd Street, New York 17, N. Y.

[fol. 51] EXHIBIT "F" TO AFFIDAVIT

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF DELAWARE

In Bankruptcy No. 1464

In the Matter of PETROLEUM CONVERSION CORPORATION, Bankrupt

ORDER

William M. Duffy, Jr. the trustee herein, being duly qualified and acting as such trustee, having reported that, based on his examination of the record of the proceedings in *Albert G. Dickinson* v. *Arthur Rinke et al.* no. E.-86-366 in the United States District Court for the Southern District of New York, he is of the opinion that an appeal to the Court of Appeals for the second circuit would be fruitless and would result in no benefit to the bankrupt estate and that he, the said trustee proposes not to prosecute said appeal, but would recommend that if any creditor desired to prosecute the said appeal in the name of and for the benefit of said estate and/or the trustee but without liability on the part of said estate or the trustee for any costs, fees or expenses, unless said appeal be successful and then only in such amounts that might be allowed by this court, then such prosecution should be allowed under the authority of sec. 64a(1) of the Bankruptcy Act (see 3 Collier on Bankruptcy 64.164); and this court having entered an order on January 19, 1949 provided for a meeting of creditors to be held on February 4, 1949 for the purpose of allowing creditors to be heard with respect to recommendations of trustee; and copies of the report of the trustee and of the order calling said meeting of creditors having been sent to all creditors more than 10 days prior to said meeting; and no creditors having objected to the recommendations of the [fols. 52-53] trustee; it is, this ninth day of February 1949:

Ordered that the trustee's proposal not to prosecute the aforementioned appeal is hereby approved and that the trustee's recommendation to allow its prosecution by creditors is hereby approved in principle, but this order is not to be

construed as granting to any specific creditor or creditors any right so to do.

Approved as to form.

(Sgd.) Stewart Lynch, Referee in Bankruptcy.

(Sgd.) Thomas Cooch, Richard F. Corroon, John S. Walker, Thomas J. Healey, Jr., Albert J. Stiftel.

[fol. 54] UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

[Title omitted]

AFFIDAVIT OF ALEXANDER KAHAN IN OPPOSITION TO MOTION TO DISMISS—Filed March 31, 1949

STATE OF NEW YORK,
County of New York, ss:

Alexander Kahan, being duly sworn, deposes and says:

That he is the attorney for the Trustee in Bankruptcy of the Intervener-Appellant, Petroleum Conversion Corporation, and makes this answering affidavit in opposition to the motion of the Plaintiff-Appellant, Albert G. Dickinson, to dismiss the appeal of the said Intervener-Appellant, Petroleum Conversion Corporation.

[fol. 55] Your deponent respectfully refers to his affidavits in support of the two motions returnable simultaneously herein—first for the extension of the time of the Intervener-Appellant, Petroleum Conversion Corporation, within which to file its record on appeal, to amend the title and to substitute Alexander Kahan Esq. as attorney for the Trustee in Bankruptcy of the said Intervener-Appellant, Petroleum Conversion Corporation, and secondly, the motion to amend the notice of appeal and the pleadings also made by the said Intervenor-Appellant, Petroleum Conversion Corporation, and asks that said affidavits be incorporated herein with the same force and effect as though fully set forth at length herein.

For the most part, the objections which have been asserted by the Plaintiff-Appellant, Dickinson, have been overcome by the second motion hereinabove stated.

It is respectfully pointed out to the Court that in view of the liberal attitude of Federal Courts towards amendment of pleadings and amendments of notices of appeal, particularly where, as in this case, the errors and omissions were made by counsel who preceded the present counsel for the Trustee in Bankruptcy, your deponent hopes and expects that this Court will grant the motion for amendment of both the notices of appeal and the pleadings, in which event Plaintiff-Appellant, Dickinson's motion automatically fails.

Your deponent also begs to point out to the Court that even without such amendments, there is no merit to the Dickinson motion and the lengthy affidavit in support thereof, since the final decree itself in paragraph "3" thereof by express language makes the earlier decree of April 10, 1947 final. It would have been a useless gesture on the part of the Petroleum Conversion Corporation to take an appeal from the interlocutory decree when the net result of the Court's making this decree final, in what the Court itself [fol. 56] calls a final decree, is to give the Intervener-Appellant, Petroleum Conversion Corporation, the right to appeal from the final decree of August 3, 1948, as well as from the interlocutory decree of April 10, 1947, which is made final by this final decree in express language.

The Plaintiff-Appellant, Dickinson, seeks in effect by his present motion, to take advantage of dubious technicalities, in an attempt to deprive the Trustee in Bankruptcy, of his unquestioned right of appeal and to impose upon the creditors and stockholders of Petroleum Conversion Corporation, such forfeitures; this practice is not looked upon with favor by Courts generally.

Plaintiff-Appellant Dickinson emphasizes the fact that the Referee in Bankruptcy had stated that the within appeal would not be prosecuted by the Trustee in Bankruptcy of Petroleum Conversion Corporation and that subsequently your deponent was directed to prosecute said appeal in behalf of said Trustee. The appeal is being prosecuted pursuant to Sec. 64a (1) of the Bankruptcy Act, by creditors of the Bankrupt Estate, where the Receiver or Trustee of the Bankrupt is unwilling or cannot go forward with such appeal. Both the Referee and Trustee in Bankruptcy merely followed the rules of this court in furthering the prosecution of the within appeal by the entry of the order dated February 9, 1949, designating your deponent to act as the at-

torney for the Trustee in the prosecution of said appeal. Certainly the plaintiff-appellant, Dickinson was not harmed by this procedure and his entire argument in this regard is specious at best.

Your deponent therefore respectfully prays that the motion to dismiss the appeal of the Intervener-Appellant, Petroleum Conversion Corporation, be denied both on the grounds that the motion is not warranted by the reasons [fols. 57-58] stated in support thereof and that any valid objections raised by Appellant Dickinson have been cured by the motion of Petroleum Conversion Corporation to amend, made simultaneously with the herein motion by the Intervener-Appellant, Petroleum Conversion Corporation.

Alexander Kahan.

Sworn to before me this 4th day of March, 1949. Victor Feingold, Attorney and Counsellor-at-Law, Exer. Powers of Notary Public, in the State of New York. Residing in Bronx County. Bronx Co. Clk's No. 1, Reg. No. A-274-F-9. N. Y. Co. Clk's No. 558 Reg. No. A-778-F-9. Commission Expires March 30, 1949.

[fol. 59] UNITED STATES CIRCUIT COURT OF APPEALS, SECOND CIRCUIT OF NEW YORK

[Title omitted]

MOTION TO EXTEND TIME TO DOCKET, ETC.—Filed March 31, 1949

Please Take Notice that upon the annexed affidavit of Alexander Kahan, Esq., sworn to February 10th, 1949 and the certified copy of order of Referee in Bankruptcy, Hon. Stewart Lynch, in the District Court of the U. S. for the District of Delaware dated February 9th, 1949 and upon all the proceedings heretofore had herein the undersigned will move this court on February 14, 1949, at 10:30 A. M., or as soon thereafter as counsel can be heard, in Room 1705, U. S. Court of Appeals for the Second Circuit, at the U. S. Courthouse, Foley Square, New York City, New York, for an order

1. Extending Intervener Appellant, Petroleum Conversion Corporation's, Bankrupt, by William M. Duffy,

Jr., Trustee in Bankruptcy, time to file its record on appeal and docketing the appeal herein, in said court in the matter entitled Albert G. Dickinson v. Arthur W. Rinke, et al. for a period of four months from February 15, 1949.

[fol. 60] 2. To amend the name of the Trustee of the Intervener Appellant, Petroleum Conversion Corporation, Bankrupt to William M. Duffy, Jr.

3. To substitute Alexander Kahan, Esq., as attorney for William M. Duffy, Jr., as Trustee in Bankruptcy of Petroleum Conversion Corporation, Bankrupt Intervener Appellant, in place and stead of James A. Vaughan and J. Harlin O'Connell, Esqs.,

and for such other and further relief as to this court may seem just and proper.

Dated: N. Y. February 10th, 1949.

Alexander Kahan, Esq., Attorney for William M. Duffy, Jr., as Trustee in Bankruptcy of Petroleum Conversion Corporation, Bankrupt, Intervener Appellant. Office & Post Office Address: 30 Broad Street, New York City, New York.

To: Samuel Hershenstein & Solomon Kaufman, Esqs., 70 Pine Street, New York City, New York; Joseph A. Cox, Esq., 51 Chambers Street, New York City, New York; James A. Vaughan, Esq., 165 Broadway, New York City, New York; Wickes, Riddel, Bloomer, Jacobi & McGuire, Esqs., 60 Broadway, New York City, New York; Satterlee, Warfield & Stephens, Esqs., 49 Wall Street, New York City, New York; John C. Sebright, Esq., 122 East 42nd Street, New York City, New York; Leo Kaplan, Esq., 122 East 42nd Street, New York City, New York; J. Harlin O'Connell, Esq., 120 Broadway, New York City, New York.

[fol. 61] UNITED STATES CIRCUIT COURT OF APPEALS, SECOND CIRCUIT OF NEW YORK

[Title omitted]

AFFIDAVIT OF ALEXANDER KAHAN, IN SUPPORT OF MOTION

STATE OF NEW YORK,
City of New York,
County of New York, ss.:

Alexander Kahan, Esq., being duly sworn deposes and says:

He is the attorney for Intervener Appellant, William M. Duffy, Jr., as Trustee of Petroleum Conversion Corporation, Bankrupt, having become such by virtue of an order of Referee in Bankruptcy, Hon. Stewart Lynch, District Court of the U. S. for the District of Delaware, dated February 9th, 1949, certified copy of which order is hereto annexed, in which court the bankruptcy proceedings of Intervener Appellant, Petroleum Conversion Corporation, have been pending since on or about July 19, 1948.

Intervener Appellant, Petroleum Conversion Corporation was adjudicated a Bankrupt on or about August 8, 1948 and William M. Duffy, Jr. was elected trustee for Inter-[fol. 62] vener Appellant, Petroleum Conversion Corporation, Bankrupt, on or about November 19, 1948.

The time of Intervener Appellant, Petroleum Conversion Corporation, Bankrupt, to file its record on appeal herein has been extended by court order and stipulation through February 15, 1949.

Deponent makes the within application for an additional extension of time of four months to file appellant's record on appeal herein for the following reasons:

1. The stenographic transcript of the trial in the District Court consists of approximately 2500 pages and is not yet available to deponent.

2. There are approximately 300 exhibits marked in evidence not yet available to deponent.

3. The opinion of the District Court is in excess of 100 pages.

4. Corporate records of Intervener Appellant, Petroleum Conversion Corporation, Bankrupt, are in Wilmington, Del-

aware, New York City, New York and elsewhere. It will take deponent considerable time to gather these records and make a thorough examination thereof, in order to adequately prepare for the effective prosecution of the within appeal.

5. The Judgment Debtor Albert G. Dickinson is the principal appellant herein and Intervener Appellant Petroleum Conversion Corporation, Bankrupt, intends to utilize the Dickinson Record on appeal to its fullest extent in the preparation, prosecution and argument of its appeal and a motion for leave so to do will be made to this court in due course.

Additionally because of the pending bankruptcy proceedings of Intervener Appellant Petroleum Conversion Corporation, the title of the Appellant on the within appeal should be amended to read, "WILLIAM M. DUFFY, JR., as trustee in [fol. 63] Bankruptcy of PETROLEUM CONVERSION CORPORATION, Bankrupt, Intervener Appellant." The Trustee's full name has been erroneously included as William F. Duffy, Jr.

Furthermore, amongst other things, the judgment from which the within appeal is being taken herein amounts to $408,949.57 with interest from August 3, 1948 and the trial record as well as the hereinabove other referred to data in Albert G. Dickinson v. Arthur W. Rinke, et al. is involved and lengthy and deponent believes that he will require at least four months within which to fully and properly assemble the material and to prepare the numerous issues of law and fact applicable upon the within appeal.

For all of the foregoing, deponent prays the granting of the within application for an extension of four months to file the record on appeal and docketing the appeal herein and for such other and further relief as to this court may seem just and proper. Deponent has made no previous application for the within relief.

Alexander Kahan (Sgd.)

Sworn to before me this 10th day of February, 1949. Victor Feingold, Attorney and Counsellor-at-Law, Exer. Powers of Notary Public in the State of New York, Residing in Bronx County. Bronx Co. Clk's No. 1, Reg. No. A-274-F-9. N. Y. Co. Clk's No. 558, Reg. No. A-778-F-9. Commission Expires March 30, 1949. (Seal.)

[fol. 63a] APPENDIX TO AFFIDAVIT

DISTRICT OF DELAWARE:

I, Stewart Lynch, Referee in Bankruptcy in and for said District, Do Hereby Certify that the attached copy of Order to Permit Continuation of Appeal in the case of Petroleum Conversion Corporation, bankrupt, No. 1464, has been compared with the original thereof and that it is a complete and correct copy of such original as it appears of record and on file in my office.

In Testimony Whereof I have hereunto set my hand at Wilmington in said District, this 9th day of February, 1949

(Sgd.) Stewart Lynch, Referee in Bankruptcy.

[fol. 64] APPENDIX TO AFFIDAVIT

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF DELAWARE

In Bankruptcy No. 1464

In the Matter of PETROLEUM CONVERSION CORPORATION, Bankrupt

Order to Permit Continuation of Appeal

At Wilmington, in said District, on this 9th day of February, 1949, upon the petition of Alexander Kahan, Esq., attorney and attorney-in-fact for Frederick K. Barbour, Prescott leB. Gardner, William H. Hayes, as surviving executor of the Estate of Emery L. Ferris, and George N. Fleming, creditors and noteholders of Petroleum Conversion Corporation, verified February 2, 1949, which petition prays an order of this court, to enable and permit the above named creditors by Alexander Kahan, Esq., their attorney, to continue the prosecution of the pending appeal in behalf of Petroleum Conversion Corporation, Bankrupt and the trustee thereof, William M. Duffy, Jr., in the U. S. Court of Appeals for the Second Circuit, from the decision and judgment of District Court Judge Vincent L. Leibell, in the case of Albert G. Dickinson v. Arthur W. Rinke, et al.—Docket No. In Equity E 86-366, U. S. District Court for the Southern District of New York, and upon all the proceedings heretofore had herein, it is

Ordered that the said creditors, Frederick K. Barbour, Prescott leB. Gardner, William H. Hayes, as surviving executor of the Estate of Emery L. Ferris, and George N. Fleming, by their attorney and attorney-in-fact, Alexander Kahan, Esq., 30 Broad Street, New York City, New York be and they hereby are permitted to continue the prosecution of [fol. 65] the said pending appeal in the U. S. Court of Appeals for the Second Circuit in behalf of Petroleum Conversion Corporation, Bankrupt, and the trustee thereof, William M. Duffy, Jr., from the decision and judgment of District Court Judge Vincent L. Leibell, in the case of Albert G. Dickinson v. Arthur W. Rinke, et al.—Docket No. In Equity E 86-366, U. S. District Court for the Southern District of New York and it is further

Ordered that the said appeal shall be prosecuted in the name of Petroleum Conversion Corporation, Bankrupt and William M. Duffy, Jr., as trustee, for the benefit of Petroleum Conversion Corporation, Bankrupt, but without liability on the part of said Bankrupt Estate for any costs, fees or expenses unless said appeal be successful and then only in such amounts as may be allowed by this court and it is further

Ordered that if a recovery is effected for the benefit of the Bankrupt Estate then the said within named creditors or any of them may petition this court for allowance for their reasonable costs and expenses including attorney's fees, pursuant to and as provided in Sec. 64a (1) of the Bankruptcy Act and it is further

Ordered that William M. Duffy, Jr., as trustee of Petroleum Conversion Corporation, Bankrupt shall make available to Alexander Kahan, Esq., 30 Broad Street, New York City, New York all corporate minutes of Petroleum Conversion Corporation, Bankrupt, the stenographic transcript and exhibits of the trial of the action Albert G. Dickinson v. Arthur W. Rinke, et al., Docket No. In Equity E 86-366 and all other documents and data as may be necessary to Alexander Kahan, Esq., in the prosecution of the said appeal but only to the extent that said trustee shall have custody and/or control of said minutes, transcript and exhibits, [fols. 66-67] and only on such terms and conditions as said William M. Duffy, Jr. shall deem necessary to protect the interests of himself and of the Bankrupt Estate in other respects, and it is further

Ordered that Alexander Kahan, Esq., 30 Broad Street, New York City, New York be and he is hereby substituted as the attorney for Appellant, Petroleum Conversion Corporation, Bankrupt, upon the said Appeal.

(S.) Stewart Lynch, Referee in Bankruptcy.

Approved as to form: (S.) Thomas Cooch, Richard F. Corroon, John S. Walker, Thomas J. Healy, Jr., Albert J. Stiftel.

[fol. 68] UNITED STATES CIRCUIT COURT OF APPEALS, SECOND CIRCUIT OF NEW YORK

[Title omitted]

MOTION TO AMEND NOTICE OF APPEAL, ETC.—Filed March 31, 1949

Please Take Notice that upon the annexed affidavit of Alexander Kahan, Esq., sworn to March 3, 1949, and upon all the proceedings heretofore had herein and pursuant to Sec. 1653 of the New Title 28 U. S. Code Judiciary and Judicial Procedure and Rule 15 a, b and c of the Federal Rules of Civil Procedure and such other provisions of the U. S. Code as may be applicable hereto, the undersigned will move this court on March 7, 1949 at 10:30 A. M., or as soon thereafter as counsel can be heard, in Room 1705, U. S. Court of Appeals for the Second Circuit, at the U. S. Courthouse, Foley Square, New York City, New York, for an order

Amending the Notice of Appeal of the Intervener Appellant Petroleum Conversion Corporation, Bankrupt by William M. Duffy, Jr., Trustee by adding to the Notice of Appeal heretofore duly filed herein dated September 1, 1948 by J. Harlin O'Connell, Attorney for Intervener Petroleum Conversion Corporation on behalf of William M. Duffy, Jr., as Temporary Receiver in Bankruptcy of the said Petroleum Conversion Corporation, the following:

[fol. 69] "And from each and every part of said decree dated August 3, 1948 as it may adversely affect the rights of said Petroleum Conversion Corporation; as well as from each and every part of the decree en-

tered in the above entitled action on April 10, 1947 as it may adversely affect the rights of the said Petroleum Conversion Corporation including but without limitation Paragraph Nos. 5, 8, 12, 13 and 14 thereof and any and all parts thereof that may adversely affect the rights of the said Petroleum Conversion Corporation."

Please take further notice that the undersigned will move this court for an order

Permitting the Intervener Petroleum Conversion Corporation to amend its pleadings to include,

A. A claim for rescission on the ground of fraud of the Settlement Agreement of January 6, 1938 entered into between the Intervener Petroleum Conversion Corporation and Plaintiff Albert G. Dickinson and his son H. Randel Dickinson as well as the return to Petroleum Conversion Corporation of the consideration paid by it thereunder to Plaintiff Albert G. Dickinson and his son H. Randel Dickinson and

B. To include the claim of an additional sum of $87,310.28 wrongfully and fraudulently paid to the Plaintiff Albert G. Dickinson on its behalf and out of its funds together with interest on the respective payments together with appropriate interest thereon from January 6, 1926 so as to make the total to be due and payable to the Petroleum Conversion Corporation $174,620.56 with interest as follows:

On $10,000.00 from January 25, 1926
On $10,000.00 from March 6, 1926
On $10,000.00 from March 22, 1926
On $10,000.00 from April 6, 1926
On $12,000.00 from April 10, 1926
On $10,000.00 from May 13, 1926
On $20,000.00 from August 24, 1926
On $5,310.28 from September 7, 1926
On $1,624.68 from September 7, 1926
On $15,000.00 from September 14, 1926
On $15,000.00 from September 28, 1926
On $30,000.00 from October 11, 1926
On $27,310.28 from December 10, 1926,

all fraudulently paid to the said Plaintiff Albert G. [fol. 70] Dickinson and Fred B. Lloyd, deceased, out of funds to which the said Petroleum Conversion Corporation was entitled, and

C. For such other amendments of the pleadings as may become necessary in the premises, and for such other and further relief as to this court may seem just and proper in the premises and upon such terms and conditions as the court may deem proper.

Dated: N. Y. March 3, 1949.

Alexander Kahan, Esq., Attorney for William M. Duffy, Jr., as Trustee in Bankruptcy of Petroleum Conversion Corporation, Bankrupt, Intervener, Appellant. Office & Post Office Address 30 Broad Street, New York City, New York.

To: Samuel Hershenstein & Solomon Kaufman, Esqs., 70 Pine Street, New York City, New York.

Joseph A. Cox, Esq., 51 Chambers Street, New York City, New York.

James A. Vaughan, Esq., 165 Broadway, New York City, New York.

Wickes, Riedel, Bloomer, Jacobi & McGuire, Esqs., 60 Broadway, New York City, New York.

Satterlee, Warfield & Stephens, Esqs., 49 Wall Street, New York City, New York.

John C. Sebright, Esq., 122 East 42nd Street, New York City, New York.

Leo Kaplan, Esq., 122 East 42nd Street, New York City, New York.

J. Harlin O'Connell, Esq., 120 Broadway, New York City, New York.

[fol. 71] UNITED STATES CIRCUIT COURT OF APPEALS, SECOND CIRCUIT OF NEW YORK

[Title omitted]

AFFIDAVIT OF ALEXANDER KAHAN IN SUPPORT OF MOTION

STATE OF NEW YORK,
City of New York,
County of New York, ss:

Alexander Kahan, Esq., being duly sworn deposes and says:

He is the attorney for Intervener Appellant, William M. Duffy, Jr., as Trustee of Petroleum Conversion Corporation, Bankrupt, having become such by virtue of an order of Referee in Bankruptcy, Hon. Stewart Lynch, District Court of the U. S. for the District of Delaware, dated Feb'y 9, 1949 as is heretofore fully set forth in the affidavit dated February 10, 1949 on the motion heretofore served upon the parties and noticed for argument in this court, which affidavit is respectfully incorporated herein by reference hereto as though fully set forth herein.

Your deponent has been served with a Notice of Motion by the Plaintiff Appellant Albert G. Dickinson herein for a dismissal of this appeal, the same being returnable on [fol. 72] March 7, 1949 which is the present return date for the aforesaid motion of your deponent.

In the short time since your deponent has become attorney for the Trustee herein he has tried to familiarize himself as quickly as possible with a record in excess of 2500 pages and 300 exhibits as well as 100 page opinion of the District Court. This has been a task of tremendous difficulties due to the fact that the records are not in your deponent's possession nor are they presently available to your deponent. Nevertheless your deponent has ascertained that there is necessity for amending the Notice of Appeal and the pleadings even from the examination of only the files of the District Court for the Southern District of New York.

Your deponent feels that he would be derelict in his duty as the attorney for the Trustee if he did not immediately ask this court for leave to amend the said Notice of Appeal and pleadings as is set forth in the Notice of Motion herein;

since without such relief the Trustee might be irreparably prejudiced in the prosecution of this appeal.

This has been particularly emphasized by the motion brought on behalf of the Plaintiff Appellant Dickinson returnable simultaneously herewith, in which motion the jurisdiction of this court, in so far as the appeal of the Trustee in Bankruptcy is concerned, has been attacked. The net result of the motion of the Plaintiff Appellant Dickinson is to claim that this court has no jurisdiction over the appeal heretofore taken by the Trustee in Bankruptcy on the various grounds stated in said motion. It is for this reason, particularly that Section 1653 of the New Title U. S. Code Judiciary and Judicial Procedure is applicable.

Your deponent wishes also to respectfully call the court's attention, as well as the attention of the attorneys for all the parties hereto, to the fact that he may find it necessary after a fuller examination of the entire record in these [fols. 73-74] proceedings to request further amendments and respectfully urges on behalf of the Trustee that the relief requested herein is without prejudice to any further relief that may become necessary, upon fuller examination and investigation of the trial record, exhibits and other applicable records herein by deponent.

Wherefore your deponent prays for the relief set forth in the annexed Notice of Motion, reserving any and all rights for further relief as hereinabove set forth.

(Sgd.) Alexander Kahan.

Sworn to before me this 3rd day of March, 1949. Victor Feingold, Attorney and Counsellor-at-Law, Exer. Powers of Notary Public in the State of New York. Residing in the Bronx County. Bronx Co. Clk's No. 1, Reg. No. A-274-F-9. N. Y. Co. Clk's No. 558, Reg. No. A-778-F-9. Commission Expires March 30, 1949. (Seal.)

[fol. 75] UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

[Title omitted]

AFFIDAVIT OF JAMES A. VAUGHAN IN OPPOSITION TO MOTION, AMEND NOTICE OF APPEAL, ETC.

STATE OF NEW YORK,
County of New York:

James A. Vaughan, being duly sworn, deposes and says:

1. I am an attorney-at-law, and attorney for Burnham and Vaughan, interveners for themselves and all other Rinke Agency subscribers, appellee-respondents in the above action, 72 of whom are judgment creditors under the decree and judgment entered herein dated August 3, 1948.

2. This affidavit is made in opposition to the motion herein by "Alexander Kahan, Esq., attorney for William M. [fol. 76] Duffy, Jr. as Trustee in Bankruptcy of Petroleum Conversion Corporation, Bankrupt, intervener-appellant" for an order, (a) extending the time of "Intervener appellant, Petroleum Conversion Corporation, Bankrupt, by William M. Duffy, Jr., Trustee in Bankruptcy, to file its record on appeal and docketing the appeal herein" for a period of four (4) months from February 15, 1949; and (b) "to substitute Alexander Kahan, Esq. as attorney for William M. Duffy, Jr. as Trustee in Bankruptcy for Petroleum Conversion Corporation, Bankrupt, intervener appellant, in place and stead of James A. Vaughan and J. Harlin O'Connell, Esquires."

3. Petroleum Conversion Corporation now in bankruptcy in the District Court of the United States for the District of Delaware was an intervener in the above action and its attorney of record was J. Harlin O'Connell, Esq. The deponent was not an attorney of record for the bankrupt. No substitution of counsel for the bankrupt has been filed herein by the attorney of record for the bankrupt, J. Harlin O'Connell.

4. A notice purporting to be a Notice of Appeal from the decree herein dated and filed August 3, 1948 was given on September 1, 1948 by "J. Harlin O'Connell, Attorney for Intervener Petroleum Conversion Corporation," that "Wil-

liam M. Duffy, Jr., as temporary receiver in bankruptcy of Petroleum Conversion Corporation Bankrupt, on behalf of said Petroleum Conversion Corporation, an intervener herein, hereby appeals. . . ." Thereafter in the District Court for District of Delaware at Wilmington before Stewart Lynch, Esq., Referee in Bankruptcy, hearings were held for the purpose of determining whether or not the Trustee of the bankrupt should be authorized to prosecute such appeal. On January 19, 1949, said William M. Duffy, Jr., Trustee, submitted his Report, copy of which is annexed hereto marked "Exhibit A", recommending that such appeal be not prosecuted by and at the expense of the bankrupt estate. The order of said Referee in Bankruptcy entered thereon is dated February 9, 1949, and copy thereof is annexed hereto marked "Exhibit A-1." The Court's attention is particularly directed to this order.

[fol. 77] 5. Thereafter and on or about February 4, 1949, Alexander Kahan, Esq., Attorney for Frederick E. Barbour, Prescott LeB. Gardner, William H. Hayes, as surviving executor of the Estate of Emery L. Ferris, and George N. Fleming, creditors of Petroleum Conversion Corporation, in bankruptcy, prayed for an order permitting said creditors to prosecute an appeal herein on behalf of said bankrupt and the Trustee thereof. The order of the Referee (annexed to Mr. Kahan's supporting affidavit) granting such permission provides, among other things, that

> ". . . The said creditors, Frederick K. Barbour, Prescott LeB. Gardner, William H. Hayes, as surviving executor of the Estate of Emery L. Ferris, and George N. Fleming, by their attorney and attorney-in-fact, Alexander Kahan, Esq., 30 Broad Street, New York City, New York be and they hereby are permitted to continue the prosecution of the said pending appeal."

Said order provides further that

> ". . . the said appeal shall be prosecuted in the name of Petroleum Conversion Corporation, Bankrupt and William M. Duffy, Jr., as trustee, for the benefit of Petroleum Conversion Corporation, Bankrupt, but without liability on the part of said Bankrupt Estate for any costs, fees or expenses unless said appeal be successful and then only in such amounts as may be allowed by this court."

6. None of the said four creditors of the bankrupt named in said order have appeared herein. They are not before this court. The said order of the Referee confers authority only on the said named creditors to continue the prosecution of the said purported pending appeal.

7. Under the authority of said order of the Referee, such appeal may be prosecuted in the name of the bankrupt and its Trustee but "without liability on the part of said bank-
[fol. 78] rupt estate for any costs" except as the District Court for the District of Delaware may allow in the event such appeal be successful; and said order expressly stipulates that said appeal, if prosecuted, shall be prosecuted in the name of the bankrupt and its Trustee with such limitation of liability in connection therewith.

8. There is no party before this court against whom costs could be assessed in the event such appeal on behalf of the bankrupt estate and the Trustee be unsuccessful.

9. Heretofore and on March 10, 1948 said Alexander Kahan, Esq. made a motion in the Court below for an order permitting the intervention of two former preferred stockholders of Petroleum Conversion Corporation, now in bankruptcy, to intervene derivatively. In his affidavit dated March 1, 1948 in support of that motion Mr. Kahan stated:

> "Deponent has examined all available records of the within litigation, consisting of the trial record, several opinions of the trial and appeal courts, briefs, exhibits, and other relevant data appertaining thereto . . ."

Said motion to intervene derivatively was denied by Honorable Vincent L. Leibell, D.J. by order entered March 22, 1948.

10. Accordingly in view of Mr. Kahan's activities and stated familiarity with the trial records, briefs, exhibits, etc. of said Petroleum Conversion Corporation in the litigation herein, his motion for an order for additional time of four (4) months from February 15, 1949, within which to prepare and complete his record on appeal is unreasonable. Further delay in the prosecution of the appeal herein would be prejudicial to the seventy-two (72) Rinke Agency subscribers in whose favor the decree and judgment dated August 3. 1948 has been entered herein.

Wherefore deponent prays that the motion herein be denied on the grounds:

1. That the real parties, to wit the four creditors, Frederick K. Barbour, Prescott LeB. Gardner, William H. Hayes, surviving executor of the Estate of Emery L. Ferris, and George N. Fleming of the bankrupt, Petroleum Conversion Corporation, have not appeared herein.

[fol. 79] 2. That in event their prosecution of the appeal herein by said creditors in behalf of the bankrupt and its trustee should not be successful, there is no one before this Court against whom costs may be assessed.

3. That no bond for costs has been filed herein for or in behalf of the bankrupt and its trustee incident to the purported appeal.

4. That there is no person properly before the Court to prosecute an appeal for and in behalf of the bankrupt and its trustee.

(Signed) James A. Vaughan, Attorney for E. Lewis Burnham and James A. Vaughan et al., Interveners-Appellees, Office and P. O. Address: 165 Broadway, New York 6, N. Y.

Sworn to before me this 3rd day of March, 1949. Anne K. Conway, Notary Public in the State of New York. Qualified in Bronx Co. Bronx Co. Clk's No. 165, Reg. No. 366-C-0. N. Y. Co. Clk's No. 1198, Reg. No. 1091-C-0. Commission Expires March 30, 1950.

To: Alexander Kahan, Esq., Attorney for William M. Duffy, Jr., as Trustee in Bankruptcy of Petroleum Conversion Corporation, Bankrupt, Interverer-Appellant, 30 Broad Street, New York, N. Y.

Solomon Kaufman, Esq., Attorney for Plaintiff-Appellant, 70 Pine Street, New York 5, N. Y.

J. Harlin O'Connell, Esq., 120 Broadway, New York, N. Y.

Wickes, Riddel, Bloomer, Jacobi & McGuire, Esqs., 60 Broadway, New York, N. Y.

Satterlee, Warfield & Stephens, Esqs., 49 Wall Street, New York, N. Y.

John C. Sebright, Esq., 122 East 42nd Street, New York, N. Y.

Leo Kaplan, Esq., 122 East 42nd Street, New York, N. Y.
Joseph A. Cox, Esq., 51 Chambers Street, New York, N. Y.

[fol. 80] EXHIBIT A TO AFFIDAVIT

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF DELAWARE

In Bankruptcy No. 1464

In the Matter of PETROLEUM CONVERSION CORPORATION, Bankrupt

Report of Trustee

To: Stewart Lynch, Esq., Referee in Bankruptcy.

William M. Duffy, Jr., the Trustee herein, being duly qualified and acting as such Trustee, respectfully reports his conclusions and recommendations as to the advisability of instituting and prosecuting an appeal from the decision of the United States District Court for the Southern District of New York to the United States Circuit Court of Appeals, Second Circuit, in the case of Albert G. Dickinson versus Arthur W. Rinke, *et* al.—No. E-86-366, as follows:

The single matter with which the Trustee and his attorney have been most concerned is the question of whether or not the Trustee should prosecute an appeal to the United States Court of Appeals for the Second Circuit from the decision of Judge Vincent L. Leibell in the United States District Court for the Southern District of New York in the case of Albert G. Dickinson v. Arthur W. Rinke, et al., No. E-86-366, in which Petroleum Conversion Corporation, as an Intervener, had asserted a Counterclaim.

Judge Leibell held, in brief, that the counterclaim stated a good cause of action but that the right of action belonged to the various subscribers to the so-called Rinke Agency, represented as a class by E. Lewis Burnham and James A. Vaughn who, also as interveners, had asserted a similar counterclaim and did not belong to the Bankrupt.

The cause of action, Judge Leibell held, was that Dickinson and one Lloyd fraudulently procured the payment to them of $176,245.24 from funds held by the Rinke Agency

in connection with the purchase of the Texas City plant of Knox Process Corporation which was being sold through the foreclosure of liens of creditors, and that Dickinson and [fol. 81] Lloyd had to make restitution.

If it could be shown (a) That Petroleum Conversion Corporation succeeded to any rights which Knox Process Corporation may have had in the Rinke Agency funds; and (b) that Knox Process Corporation had rights in said funds over and above the fact that the purpose of the subscriptions to the Rinke Agency funds ostensibly was to rescue the business of Knox Process Corporation from the creditors and for the investors, then Petroleum Conversion Corporation conceivably should be entitled to the recovery.

To put it mildly, the record in Dickinson v. Rinke is involved and lengthy. The Trustee and his attorney have studied the Opinion of Judge Leibell, his Findings of Fact and Conclusions of Law, portions of the Testimony, and many of the exhibits. In addition, they have discussed the matter with both Mr. James A. Vaughan and Mr. Alexander Kahan, attorney for certain creditors of Petroleum Conversion Corporation.

The Trustee is satisfied from his investigation that Judge Leibell had sufficient evidence and supporting authorities for finding as he did and believes that an appeal to the Court of Appeals would probably be fruitless.

It seems quite clear to the Trustee that the particular fraud complained of was just one part of a master scheme to defraud the subscribers to Rinke Agency generally, that the schemers never intended that Knox Process Corporation or Petroleum Conversion Corporation should get anything over what might be necessary to conceal the fraud, and that any representations to the subscribers to the contrary were simply false and what might be called window-dressing. See for examples of evidence of this, exhibits 17, 18, 19, U, and III.

It seems unlikely that any further evidence of any probative value could exist which would overcome contrary evidence in the record.

[fol. 82] Mr. Kahan, in urging an appeal, lays great stress on a claimed conflict of interest between Mr. Vaughan and Petroleum Conversion Corporation. It is admittedly true that Mr. Vaughan, and Mr. J. Harlin McConnell, attorney for Petroleum Conversion Corporation, worked together on

the case, and this, it seems to the Trustee, was fully justified to the extent that their respective claims were idential except as to the identity of the proper claimant. This conflict was disclosed to Judge Leibell on the first page of the joint brief submitted by them at the conclusion of the trial.

Apparently no objection was raised to this cooperation between counsel until about March 1, 1948, when Mr. Kahan petitioned for leave to intervene and made substantially the same contentions. Judge Leibell, in denying this petition on March 16, 1948, said, inter alia:

> "In so far as their petition for leave to intervene is based on the charge that the corporation's rights in respect to the $176,000 claim have not been fully and honestly presented, the history of this litigation, as set forth in the Court's opinion of October, 1946, and the trial record show that any such charge is baseless."

The Trustee accordingly proposes not to prosecute said appeal and petitions the approval of this court.

Trustee would recommend that if any creditor desires to prosecute said appeal in the name of and for the benefit of the bankrupt estate and/or the Trustee, but without liability on the part of said estate for any costs, fees, or expenses, unless said appeal be successful and then only in such amounts as might be allowed by this court, then such prosecution should be allowed under the authority of Section 64a(1) of the Bankruptcy Act (See 3 Collier on Bankruptcy, Par. 64.104).

Wherefore, your petitioner prays that his decision in this matter be approved by this Court.

Respectfully submitted, (Sgd.) William M. Duffy, Jr.,
Trustee.

(Sgd.) Thomas Cooch, Attorney for Trustee.

[fol. 83] EXHIBIT A-1 TO AFFIDAVIT

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF DELAWARE

In Bankruptcy No. 1464

In the Matter of PETROLEUM CONVERSION CORPORATION, Bankrupt

ORDER

William M. Duffy, Jr. the trustee herein, being duly qualified and acting as such trustee, having reported that, based on his examination of the record of the proceedings in *Albert G. Dickinson* v. *Arthur Rinke et al.* no. E.-86-366 in the United States District Court for the Southern District of New York, he is of the opinion that an appeal to the Court of Appeals for the second circuit would be fruitless and would result in no benefit to the bankrupt estate and that he, the said trustee proposes not to prosecute said appeal, but would recommend that if any creditor desired to prosecute the said appeal in the name of and for the benefit of said estate and/or the trustee but without liability on the part of said estate or the trustee for any costs, fees or expenses, unless said appeal be successful and then only in such amounts that might be allowed by this court, then such prosecution should be allowed under the authority of sec. 64a(1) of the Bankruptcy Act (see 3 Collier on Bankruptcy 64.164); and this court having entered an order on January 19, 1949 provided for a meeting of creditors to be held on February 4. 1949 for the purpose of allowing creditors to be heard with respect to recommendations of trustee; and copies of the report of the trustee and of the order calling said meeting of creditors having been sent to all creditors more than 10 days prior to said meeting; and no creditors having objected to the recommendations of the [fols. 84-85] trustee; it is, this ninth day of February, 1949:

Ordered that the trustee's proposal not to prosecute the aforementioned appeal is hereby approved and that the trustee's recommendation to allow its prosecution by creditors is hereby approved in principle, but this order is not to

be construed as granting to any specific creditor or creditors any right so to do.

Approved as to form.

(Sgd.) Stewart Lynch, Referee in Bankruptcy.

(Sgd.) Thomas Cooch, Richard F. Corroon, John S. Walker, Thomas J. Healy, Jr., Albert J. Stifte..

[fol. 86] UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT, OCTOBER TERM, 1948

No. —

(Motions Argued March 7, 1949)

Docket No. —

ALBERT G. DICKINSON, Appellant,

v.

FRANCIS J. MULLIGAN, Public Administrator, Appellee-Appellant; E. Lewis Burnham, et al., Appellees, and Petroleum Conversion Corporation, Appellant

Before: L. Hand, Swan and Frank, Circuit Judges

OPINION—March 31, 1949

On motion to dismiss the appeal of the Petroleum Conversion Corporation from a judgment of the District Court for the Southern District of New York, entered August third, 1948.

[fol. 87] Solomon Kaufman, attorney for the appellant, Dickinson, and James A. Vaughan, attorney for E. Lewis Burnham, et al, appellees, for the motion.

Alexander Kahan, opposed.

L. HAND, Circuit Judge:

The appellant, Dickinson, and the appellees, Burnham and others, constituting the "Rinke Agency Subscribers," move to dismiss the appeal of the Petroleum Conversion Corporation from a judgment of the district court entered August third, 1948. The chief question is whether

the corporation could have appealed from an earlier judgment, entered on April tenth, 1947, which dismissed a counterclaim filed by it after it had been allowed to intervene in the action; or whether it could appeal only from the judgment of 1948. Other questions, relating to the formal regularity of the appeal and to an extension of the time within which to file the record and brief, we reserve for the moment. Some outline of the action and what has gone before is necessary to an understanding of the motion. Dickinson sued Lloyd and others to impress a lien upon certain shares of the Petroleum Conversion Corporation, not then a party to the action; the district judge dismissed the complaint, and we reversed the judgment on January nineteenth, 1943.* Our opinion sufficiently states the controversy as it was at that time. On December third, 1943, the Petroleum Conversion Corporation was allowed to intervene by consent, and it filed a counterclaim in which it demanded the cancellation of a large number of its shares, on the ground that they had [fol. 88] been fraudulently issued, and the recovery of $87,310.28 from Dickinson and Lloyd, alleged to have been unlawful profits, obtained while acting as fiduciaries. On the same day Burnham and Vaughan were also allowed to intervene upon behalf of themselves and all other subscribers to a fund, known as the "Rinke Agency Subscribers," and to file a counterclaim demanding recovery from Dickinson and Lloyd of the same amount as the Petroleum Conversion Corporation claimed in its counterclaim.

The cause was tried a second time in 1944 and 1945, and, after long delay, an interlocutory judgment was finally entered on April tenth, 1947, as follows:

(1) Dismissing the complaint of Dickinson in toto;

(2) Declaring that the Petroleum Conversion Corporation had no right to 244,041 shares of its stock, then in possession of the court, and directing it to issue new certificates for those shares to the shareholders of another corporation, but that any shares not so distributed should be transferred to others as might be later decreed;

(3) Declaring that of 20,796 shares of its stock in possession of Lloyd's administrator, 8,200 should be de-

* *Dickinson* v. *Rinke*, 132 Fed. (2) 805.

livered to the Petroleum Conversion Corporation, but that its claim to the remaining 12,596 shares be dismissed;

(4) Dismissing its claim for a rescission of a contract between itself and the plaintiff and his son;

(5) Dismissing its claim against Dickinson and Lloyd for the sum of $87,310.28;

(6) Dismissing the claims of Lloyd's administrator altogether;

[fol. 89] (7) Granting recovery of $174,620.56 with interest against Dickinson and Lloyd's administrator in favor of the "Rinke Agency Subscribers," and providing a concourse of all these, by which their several claims could be liquidated and the amounts ascertained to which each was entitled out of the sum mentioned.

On August third, 1948, after appropriate hearings, the district court entered a final judgment, fixing the several claims of all the "Rinke Agency Subscribers," who had proved their claims, and barring the claims of those who had not. Thus, it appears that the judgment of April tenth, 1947, finally disposed of the counterclaim of the Petroleum Conversion Corporation, as well as of any claim against that corporation by any of the parties; there remained, so far as that corporation was concerned, only the issue of those of its shares to others which the judgment directed—merely ministerial acts on any theory. That judgment was not final, however, as to the "Rinke Agency Subscribers," and became so only by the judgment entered on August third, 1948.

Had the petition of the Petroleum Conversion Corporation to intervene been denied, the denial would have been appealable, because in that event the petitioner would not have been "at liberty to assert or protect" its interests in some more appropriate proceeding."* If so, it is not easy to understand why a party who has been allowed

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* *Brotherhood of Railroad Trainmen* v. *Baltimore & Ohio R. R. Co.*, 331 U. S. 519, 524;
Missouri-Kansas Pipe Line Co. v. *United States*, 312 U. S. 502, 508.

to intervene, should not be allowed an immediate appeal from a judgment dismissing his claim after a trial. The petition of intervention must within its own four corners [fol. 90] disclose the basis of the claim, and the merits so disclosed will determine the right to intervene; there would appear to be no more reason to accelerate the right to appeal when the facts which it alleges, if true, do not justify the claim in law, than when, though the allegations are enough, they turn out to be false. On the other hand it is true that the whole nexus, or nidus, of facts out of all the disputes and claims arose were not disposed of by the judgment of April tenth, 1947. True, that decree did decide that Dickinson and Lloyd owed the "Rinke Agency Subscribers" about $175,000 and that was a definitive decision; but it did not decide who was to participate in that limited award. That required another complicated proceeding in which over seventy claims were tried out and liquidated, and at the end of which all claimants were barred who had not appeared. That was in no sense a ministerial implementation of the judgment of April tenth, 1947.

In the view of all members of the court, as it is now constituted, this should make no difference for the whole counterclaim of the Petroleum Conversion Corporation had been finally disposed of on April tenth, 1947; and as to it the action was at an end as much as though it had been denied the right to intervene at all; indeed, the judgment was more final, so to say, because, unlike the denial of a petition to intervene, it was a bar to any effort to relitigate the claims determined. On the other hand, we cannot find any tenable distinction between the situation at bar, and that which was before the court in *Clark* v. *Taylor*,* where we dismissed the appeal. It is true that the interlocutory judgment in that case had not decided anything as between the plaintiff and Taylor, the presi- [fol. 91] dent of the A. S. C. A. P.; in which regard it was different from the judgment of April tenth, 1947, which did decide that Dickinson and Lloyd were liable to the "Rinke Agency Subscribers," and what was the limit of that liability. But we do not understand that the majority in *Clark* v. *Taylor, supra,* went upon any such distinction; on the contrary they regarded the "transaction," the

* 163 Fed. (2) 940.

"occurrence" as a whole, as the controversy, not the series of mutual rights and liabilities which had arisen out of it; and they held that until all these had been determined, no appeal lay, however finally any part of those rights and liability might be disposed of. It was only in case "transactions" or "occurrences" wholly disconnected were coupled, as the Rules permitted, that separate appeals could be taken. That case was decided only after the greatest deliberation, and the opinions then rendered contain all that can be said in support of either view. It appears to all three of us in the present court most undesirable to repudiate a precedent so established. In a final court of varying composition it might be asking too much that the first decision should become an authoritative precedent against the convictions of the other members, but we are not in that predicament. Dickinson and the "Rinke Agency Subscribers" may be able to secure a review by certiorari in the Supreme Court; and, if they fail, it is either because that court believes that the first decision was right, or because a solution of the issue is not of enough importance to demand its intervention. In either event we ought to be content, as we are, to sink our differences, and yield to the precedent, whatever our confidence in our conclusion. We shall therefore deny the motion, so far as it depends upon the argument that the judgment of April tenth, 1947, was final as to the Petroleum Conversion Corporation, and that by its failure then to appeal it lost any right of review.

[fol. 92] The formal defects of the appeal need not detain us long. The Petroleum Conversion Corporation was adjudicated a bankrupt in the District of Delaware on August eighth, 1948, and one, Duffy, was appointed its temporary receiver. On September first, 1948, a notice of appeal was filed in the office of the clerk of the Southern District of New York, signed by the attorney before bankruptcy of the Petroleum Conversion Corporation. This notice purported to ask a review of the provisions of the judgment of August third, 1948, which dismissed the counterclaim of the Petroleum Conversion Corporation; but there were no such provisions in that judgment; they were in the judgment of April tenth, 1947. Perhaps the appellant thought that the judgment of August third, 1948, reaffirmed the earlier judgment; but at any rate the intent was perfectly manifest and that must

control. The notice of appeal described Duffy, the temporary receiver, as the appellant, but declared that he was appealing in behalf of the Petroleum Conversion Corporation. Nothing further was done until January nineteenth, 1949, when at the request of Duffy, who had by then become the trustee, the referee called a meeting of creditors in Wilmington for February fourth to consider whether the appeal should be prosecuted by the trustee. The trustee recommended against this course, and, since at the creditors' meeting no one objected to his decision, the referee approved the recommendation. However, he also approved another recommendation of the trustee; *i.e.*, that the appeal might be prosecuted by individual creditors at their own expense, and an order to that effect was entered on February ninth. In accordance with this the referee on the same day passed a second order, allowing four named creditors to prosecute the appeal on behalf of the Petroleum Conversion Corporation and of its trustee, without cost to the bankrupt estate. [fol. 93] A bankrupt even after adjudication may commence a suit in his name before the appointment of a trustee,* although the trustee may refuse to prosecute it after he had been appointed. The same must be true of an appeal, which is akin to a suit in another court, and used to be so regarded, even formally. Since the Petroleum Conversion Corporation, though bankrupt, could take the appeal, as a step quite outside the bankruptcy proceeding, it was free to be represented by an attorney of its choice. Moreover, it was within the power of the bankruptcy court to allow the four creditors at their own cost to prosecute the appeal as a possible asset of the estate. The appellant must post the necessary bond and otherwise conform to the rules, but the motions to dismiss the appeal will be denied.

The motion to be allowed four months within which to perfect the appeal will also be granted, dating from April first, 1949. The appeal can under no circumstances be heard at the present term of this court, and it is possible that the Supreme Court may grant certiorari. The litigation has

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* *Johnson* v. *Collier*, 222 U. S. 538;
Danciger v. *Smith*, 276 U. S. 542;
Meyer v. *Fleming*, 327 U. S. 161, 165-168;
Paradise v. *Vogtlandische Maschinen-Fabrik*, 99 Fed. (2) 53 (C. A. 3).

already been so long delayed that this further delay cannot be of serious moment.

Motions to dismiss denied.

Motion to extend the time to file the record and brief extended to August first, 1949.

[fols. 94-95] UNITED STATES COURT OF APPEALS, SECOND CIRCUIT

[Title omitted]

ORDER DENYING MOTION TO DISMISS—March 31, 1949

Motions having been made herein to extend the time to perfect the appeal; to correct the title of the cause; to substitute attorneys for Intervenor-Appellant; to amend the notice of appeal; to amend the pleadings; and to dismiss the appeal,

Upon consideration thereof, it is

Ordered that the motion to dismiss the appeal be and it hereby is denied.

Further ordered that the time to file the record and brief be and it hereby is extended to August 1, 1949.

Alexander M. Bell, Clerk.

[fol. 96] IN UNITED STATES COURT OF APPEALS

DECISION ON RECONSIDERATION—May 26, 1949

On Wednesday, May 25, 1949, an oral ex parte application was made to Hon. Learned Hand, Chief Judge for a reconsideration of the motion found here on pages 59 to 67.

The following is the court's endorsement made on the motion papers as a result of the application for reconsideration:

"Motion denied except as already granted on March 31, 1949.

May 26, 1949.

L. H., T. W. S., J. N. F., C.J.J."

[fols. 97-98] UNITED STATES COURT OF APPEALS, SECOND CIRCUIT

[Title omitted]

ORDER DENYING MOTION TO EXTEND TIME, ETC.—May 26, 1949

An application having been made herein by counsel for Intervenor, Petroleum Conversion Corporation, that the court reconsider the motion made to extend the time, to correct the title of the cause and to substitute attorneys for Intervenor-Appellant,

Upon consideration thereof, it is

Ordered that the motion to extend the time, to correct the title of the cause and to substitute attorneys for Intervenor-Appellant be and it hereby is denied, except as already granted in the opinion rendered by the Court on March 31, 1949.

Alexander M. Bell, Clerk.

[fol. 99] IN UNITED STATES COURT OF APPEALS

DECISION ON MOTION TO RECONSIDER—May 26, 1949

On Wednesday, May 25, 1949, an oral ex parte application was made to Hon. Learned Hand, Chief Judge for a reconsideration of the motion found here on pages 68 to 74.

The following is the court's endorsement made on the motion papers as a result of the application for reconsideration:

"Motion denied.

L. H., T. W. S., J. N. F., C. JJ."

May 26, 1949.

[fol. 100-101] UNITED STATES COURT OF APPEALS, SECOND CIRCUIT

[Title omitted]

ORDER DENYING MOTION TO RECONSIDER—May 26, 1949

An application having been made herein by counsel for Intervenor, Petroleum Conversion Corporation, that the court reconsider the motion made to amend the notice of appeal and the pleadings,

Upon consideration thereof, it is.

Ordered that the motion to amend the notice of appeal and the pleadings be and it hereby is denied.

Alexander M. Bell, Clerk.

[fol. 102] Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 102] SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed October 10, 1949

The petition herein for a writ of certiorari to the United States Court of Appeals for the Second Circuit is granted, limited to questions 1 and 2 presented by the petition for the writ. The case is transferred to the summary docket.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

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IN THE

Supreme Court of the United States

October Term—19[redacted] 1949

No. 150

ALBERT G. DICKINSON,
Petitioner,

against

PETROLEUM CONVERSION CORPORATION.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT, AND BRIEF IN SUPPORT THEREOF

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IN THE

Supreme Court of the United States

October Term—1948

No.

ALBERT G. DICKINSON,

Petitioner,

against

PETROLEUM CONVERSION CORPORATION.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Your petitioner, Albert G. Dickinson, respectfully prays that a writ of certiorari issue to review an order of the United States Court of Appeals for the Second Circuit, entered March 31, 1949, denying your petitioner's motion to dismiss the purported appeal of William M. Duffy, Jr., as temporary receiver of Petroleum Conversion Corporation, bankrupt, on behalf of said Petroleum Conversion Corporation, from a judgment of the District Court for the Southern District of New York, entered August 3, 1948, in the action entitled "Albert G. Dickinson, plaintiff, against Arthur W. Rinke, et al., defendants, Petroleum Conversion Corporation, E. Lewis Burnham and James A. Vaughan, et al., interveners".

Opinions Below

The opinion of the Court of Appeals for the Second Circuit (R. 62), filed on March 31, 1949, is reported at 173 Fed. 2d, 738.

Jurisdiction

Jurisdiction to issue the writ requested is found in Title 28, United States Code, Section 1254(1).

Questions Presented

1. Where two rival claimants each sought the recovery of a particular sum from other parties to the action, and judgment after trial, entered in 1947, dismissed on the merits one of said claims and granted recovery in a fixed amount to the other claimant, a spurious class,* and provided for judgment apportioning said recovery to members of the class after opportunity to absent members to intervene and claim their respective shares, and all other issues in the action were disposed of by said 1947 judgment, and the unsuccessful claimant failed to appeal therefrom within the statutory period, is its receiver in bankruptcy nevertheless entitled to a review of said 1947 judgment, dismissing its claim on the merits, by an appeal from the 1948 judgment apportioning the recovery to members of the class constituting the successful claimant?

2. Where a corporation intervenes in an action and pleads a claim against the plaintiff and one of the defendants for a particular sum of money based upon breach of

* Rule 23(a)(3), Federal Rules of Civil Procedure.

fiduciary obligation, and representatives of subscribers to the stock of said corporation simultaneously intervene and assert a claim for the same amount on behalf of the class on the ground that the sum sought came out of funds belonging to said class, alleging, however, that either said class or the corporation was entitled to the recovery, and the action is tried on behalf of both the corporation and the class by a single counsel, the attorney for the corporation, and at the end of the trial both submitted a single brief and a single set of proposed findings and conclusions of law, both leaving it to the trial court to decide whether, if a recovery was to be had, to which of said claimants it should be awarded, and the decree, dismissing the claim of the corporation on the merits and sustaining the claim of the class and fixing the total recovery thereon, was entered on the joint motion of the attorney for the corporation and the attorney for the class, and the attorney for the class was an officer of and an attorney for the corporation, should the Court of Appeals have dismissed the appeal seeking review of said decree on behalf of the corporation by its receiver in bankruptcy, on the ground that the decree was a consent decree, it appearing that both the corporation and the class had asserted and prosecuted their claims and jointly entered said decree on the basis that it was satisfactory to both if either recovered?

3. Is an appeal a nullity where:

(a) It is taken, not by a party to the action, but by a receiver in bankruptcy of such a party, which receiver has neither intervened in the action nor been substituted for said party;

(b) Said party, on whose behalf the appeal purportedly is taken, has neither before nor after bankruptcy authorized or approved said appeal;

(c) The notice of appeal was not subscribed by the receiver or his attorney, but by the attorney in the action for the bankrupt;

(d) The appellant-receiver, appointed outside the district of the action, did not obtain ancillary receivership in said district; and

(e) The decree specified in the notice of appeal did not adversely affect the interests of the appellant, and the decree which did was not cited therein?

4. (a) Does Bankruptcy Act, §64(a)(1) empower the referee in bankruptcy to authorize certain of the creditors to prosecute, on behalf, and in the name, of the bankrupt and the trustee, but without liability to the bankrupt estate for any costs, fees or expenses, unless successful, the appeal by the bankruptcy receiver from a judgment dismissing a claim by the bankrupt, after the trustee, with the approval of the referee and without opposition of the creditors, had declined to prosecute said appeal?

(b) If so, could said creditors prosecute or oppose a motion to dismiss said appeal without becoming parties to the record?

5. Did the Court of Appeals below fail to discharge its judicial responsibility by expressly shifting to this Court the decision as to whether an admittedly non-binding and erroneous precedent should be repudiated, and by making a *pro forma* decision, in order to advance the matter to this forum, thereby depriving petitioner of a decision on the merits?

Summary Statement of the Matters Involved.

The facts are not in dispute (R. 41).

On March 25, 1938, plaintiff-petitioner Albert G. Dickinson commenced an action in the United States Court for the Southern District of New York against defendant Fred B. Lloyd and others to impress an equitable lien upon, and for an accounting and discovery with respect to, certain stock issued in the name of Fred B. Lloyd by Petroleum Conversion Corporation, not then a party to the action (R. 3). Plaintiff's claim was dismissed after trial, and on appeal the judgment was reversed by the Court of Appeals for the Second Circuit, and the action remanded for a new trial (*Dickinson* v. *Rinke*, 132 Fed. 2d, 805).

On December 3, 1943, and prior to the new trial, Petroleum Conversion Corporation was permitted to intervene, as were also E. Lewis Burnham and James A. Vaughan in behalf of themselves and the subscribers to a certain stock subscription agency known as the "Rinke Agency Subscribers" (R. 3). The Petroleum Conversion Corporation filed a counterclaim in which it demanded cancellation of a large number of its shares sought by the plaintiff, Dickinson, on the ground that they had been fraudulently issued and the recovery of $87,310.28 from said Dickinson and defendant, Lloyd, alleged to have been unlawful profits obtained in breach of fiduciary duty, by reason of the following:

Petroleum Conversion Corporation asserted that it was a reorganization of Knox Process Corporation, organized to develop an oil cracking process; that Lloyd was an officer and director of both corporations, to the knowledge of Dickinson; that Dickinson had purchased the Knox

Process Corporation oil cracking plant at a mechanic's lien foreclosure sale for $87,310.28; that in violation of his preceding agreement with Knox Process Corporation to sell said property to it for stock, he had obtained $176,245.24 out of funds paid by the so-called "Rinke Agency Subscribers" under a stock subscription agency, and that out of said sum Dickinson divided $87,310.28, the cash profit, with Lloyd in breach of Lloyd's fiduciary obligation, and that Dickinson had then transferred the plant to the Petroleum Conversion Corporation for which he was voted a large block of its stock, the subject of the complaint (R. 15).

The interveners E. Lewis Burnham and James A. Vaughan, on behalf of themselves and other Rinke Agency Subscribers asserted a similar counterclaim against Dickinson and Lloyd, seeking to recover the same $87,310.28, also as a secret and illegal profit (R. 9). However, said counterclaim did not deny the corporation's right to recover said sum. On the contrary, it alleges:

> "Either (Petroleum) Conversion (Corporation) is entitled to recover from Dickinson and Lloyd jointly and severally the said illegal and fraudulent profit of $87,310.28, or the interveners herein, for and in behalf of themselves and all other similarly situated Rinke Agency subscribers, are entitled to recover said illegal and fraudulent profit of $87,310.28 from Dickinson and Lloyd jointly and severally." (R. 13, par. 22.)

The Rinke Agency subscribers were stockholders of Petroleum Conversion Corporation (R. 11, 19, 54). James A. Vaughan was an officer of and attorney for the corporation (R. 6, 8). The Rinke Agency subscribers and the corporation joined forces to secure a recovery for one or the other. Their pleadings are so substantially similar in

language as to evidence a single authorship (R. 9, 15). The attorney of record for Petroleum Conversion Corporation (R. 54) tried the action on behalf of both the corporation and Burnham and Vaughan (R. 6); at the conclusion of the trial a single brief was filed by said interveners; likewise, they jointly submitted proposed findings of fact and conclusions of law and left it to the Court to decide to which of the interveners judgment should be awarded (R. 6).

After the second trial a decree was entered in the District Court on April 10, 1947 (R. 23), disposing of all the claims of all of the parties before the Court (R. 5, 63, 64). Said decree dismissed all of the claims of Petroleum Conversion Corporation. In particular, it dismissed on the merits its claim to said $87,310.28, but sustained the claim of Burnham and Vaughan on behalf of themselves and the other Rinke Agency subscribers as a spurious class suit (R. 5) for the recovery of not only the said $87,310.28, but for the total sum of $176,245.24 received by Dickinson and Lloyd, with interest from 1926 (R. 27). It further provided for notice to the Rinke Agency subscribers and successors to their interest, not then parties to the action, as to their rights under said decree, and to intervene and assert their claims for their respective shares of said recovery and for judgment in favor of those whose claims were allowed by the Court (R. 28, 29). Said decree was entered on the motion of the attorney for Petroleum Conversion Corporation jointly with the attorney for the Rinke Agency subscribers (R. 24).

No appeal was at any time taken by Petroleum Conversion Corporation from said decree, nor has Petroleum Conversion Corporation at any time authorized any appeal to be taken therefrom on its behalf (R. 7). On the contrary, it deliberately failed to appeal therefrom (R. 6).

After the proceedings in accordance with said decree of April 10, 1947, a judgment was entered on August 3, 1948, awarding to the members of the said class or their successors who had appeared in the action, sums totaling $408,949.57, constituting the said $176,245.24 with interest from 1926 (R. 30 *et seq.*). It is to be noted that the decree of August 3, 1948, in no way disposes of any of the claims of Petroleum Conversion Corporation.

Considerably after the then statutory period to appeal from the April 10, 1947 decree had expired (28 U. S. C., §230) Petroleum Conversion Corporation was adjudicated a bankrupt in the District of Delaware on August 8, 1948, and one Duffy was appointed its temporary receiver (R. 45). By a notice of appeal dated September 1, 1948, and on that day filed in the office of the clerk of the Southern District of New York, said Duffy as such temporary receiver in bankruptcy, on behalf of the bankrupt, purported to appeal from said decree of August 3, 1948, in so far as it dismissed on the merits the claims of the bankrupt (R. 38). As already noted, there were no such provisions in said decree, nor is the 1947 decree mentioned therein. Further, although the notice of appeal named said temporary receiver as the appellant, said appeal was not subscribed by him or by his attorney, but by the attorney for the corporation (R. 39), and there was no compliance with General Order 44 (11 U.S.C.A., Sec. 53) (R. 7). Moreover, no ancillary receivership was obtained by said temporary receiver in the Southern District of New York; he at no time was substituted for the corporation, and he at no time secured leave to intervene in said action and is not a party thereto (R. 7).

Petroleum Conversion Corporation did not at any time authorize or approve said notice of appeal (R. 7).

Duffy, after appointment as trustee, decided not to prosecute said appeal on the ground that it would be fruitless (R. 58). The creditors, after notice, did not object and the referee, by an order dated February 9, 1949, approved such decision (R. 40). By a further order of the same day, upon the alleged authority of Bankruptcy Act, §64a (1) (R. 48, 60, 61), four named creditors were authorized to prosecute the appeal on behalf of Petroleum Conversion Corporation and of its trustee without cost to the bankrupt estate, unless successful (R. 47). Said creditors did not become parties to said action or to the appeal by intervention or substitution (R. 57). But it is their attorney who alone opposed petitioner's motion to dismiss the appeal. His prior efforts to step into this litigation on behalf of former preferred stockholders failed (R. 56, par. 9, R. 60). He now appears in still another guise. In the proceedings in the Court below, perhaps to bolster his status, he described himself as attorney for the trustee in bankruptcy (R. 41, 45) for which there appears to be no sanction in the referee's order cited as authority therefor (R. 45). There obviously was no compliance with General Order 44 (R. 47). The preface to the opinion below omits description of his status (R. 62).

His motion to amend the notice of appeal (R. 46) upon which he relied to defeat the motion to dismiss "for the most part" (R. 41, fol. 55) was denied (R. 68, *et seq.*).

The Grounds on Which the Decision of the Court of Appeals Below Rested

The chief question with which the Court of Appeals was concerned in its opinion was whether Petroleum Conversion Corporation could have appealed only from the 1947 judgment, which dismissed its counterclaim on the

merits, or whether an appeal on its behalf would lie from the 1948 judgment, apportioning the recovery totaling $408,949.57 to various Rinke Agency subscribers and their successors in interest (R. 62, 63).

The opinion on this question is quite extraordinary. It reaches its conclusion neither on the basis of binding precedent nor on the merits. Contrarily, as appears from the face of the opinion, each of the three judges composing the bench hearing petitioner's application were of the conclusion and conviction that the 1947 judgment, which disposed of all of Petroleum Conversion Corporation's claims, was final and appealable and the appeal from the subsequent judgment should be dismissed. The Court said in part (R. 64, 65):

> "Thus it appears that the judgment of April tenth, 1947, finally disposed of the counterclaim of the Petroleum Conversion Corporation, as well as of any claim against that corporation by any of the parties; there remained, so far as that corporation was concerned, only the issue of those of its shares to others which the judgment directed—merely ministerial acts on any theory. * * *
>
> "Had the petition of the Petroleum Conversion Corporation to intervene been denied, the denial would have been appealable, because in that event the petitioner would not have been 'at liberty to assert or protect' its interests in some more appropriate proceeding.* If so, it is not easy to understand why a party who has been allowed to intervene, should not be allowed an immediate appeal from a judgment dismissing his claim after a trial. The petition of intervention must within its own four corners disclose the basis of the claim, and

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* Citing *Brotherhood of Railroad Trainmen* v. *Baltimore & Ohio R. Co.*, 331 U. S. 519; *Missouri-Kansas Pipe Line Co.* v. *United States*, 312 U. S. 502, 508.

> the merits so disclosed will determine the right to intervene; there would appear to be no more reason to accelerate the right to appeal when the facts which it alleges, if true, do not justify the claim in law, than when, though the allegations are enough, they turn out to be false. * * *
>
> "'In view of all members of the court, as it is now constituted, this [the provision in the 'definitive decision' of April 10, 1947 (R. 65) for subsequent proceedings to permit absent Rinke Agency subscribers to intervene and procure their respective shares of the award to the class] should make no difference for the whole counterclaim of the Petroleum Conversion Corporation had been finally disposed of on April tenth, 1947; and as to it the action was at an end as though it had been denied the right to intervene at all; indeed, the judgment was more final; so to say, because, unlike the denial of a petition to intervene, it was a bar to any effort to relitigate the claims determined.'" (Matter in brackets added.)

Nevertheless, the Court held that on this issue the case at bar was undistinguishable from *Clark* v. *Taylor*, 163 Fed. 2d, 940. In that case, the District Court had held that the Alien Property Custodian, and not the state court receiver of an Austrian corporation was entitled to prosecute its claim against the defendant association for royalties, and granted summary judgment against the receiver. The Court of Appeals for the Second Circuit dismissed the appeal from said judgment for lack of finality on the ground that the claim itself had not been adjudicated on the merits.

The Court below interpreted *Clark* v. *Taylor* as holding that until all the series of mutual rights and liabilities arising out of the transaction before the Court had been determined, no appeal would lie, "however finally any

part of those rights and liabilities might be disposed of, and that it was only in case 'transactions' or 'occurrences' wholly disconnected were coupled, as the Rules permitted, that separate appeals could be taken" (R. 66).

The *Clark* case was decided by a sharply divided bench. The majority consisted of judges (Clarke and Chase) who, though still serving, did not sit in the instant case. A strong dissenting opinion (163 Fed. 2d at 944) was there written by Judge Frank, who was a member of the bench in this case. As the opinion below points out, the *Clark* case "was decided only after the greatest deliberation and the opinions then rendered contained all that can be said in support of either view" (R. 66).

Thus the Court below found itself in something of a dilemma. On the one hand, all of the judges disagreed with the *Clark* decision, at least in so far as it applied to the instant case. On the other, it readily may be inferred, they were understandably reluctant to repudiate that precedent, in the absence of participation by their brother judges who had established it.

The Court recognized that the *Clark* case was not a binding precedent. It said: "In a final court of varying composition, it might be asking too much that the first decision should become an authoritative precedent against the convictions of the other members * * *" (R. 66).

The court escapes its "predicament" (R. 66) thus: It refuses to pass on the question; rather, it strongly suggests that a review may be secured in this Court by certiorari (R. 66, 67) but that if petitioner should here fail "we ought to be content, as we are, to sink our differences and yield to the precedent whatever our confidence in our conclusion" (R. 66). It was on that basis and not on that of binding precedent or on the merits that petitioner's motion to dismiss the appeal was denied, in so far as it

depends upon the argument that the judgment of April 10, 1947 was final as to Petroleum Conversion Corporation and that by its failure to then appeal it lost any right of review (R. 66).

In its anxiety to enable this Court to determine whether *Clark* v. *Taylor* should be repudiated, the Court below made short shrift of petitioner's contentions that the purported appeal by the receiver in bankruptcy was in fact and in law a nullity. It did recognize what it chose to describe as "formal defects" (R. 66). But it took the position that although the notice of appeal asked a review of the provisions of the judgment of August 3, 1948, dismissing Petroleum's counterclaim, and although there were no such provisions in that judgment but were contained in the judgment of April 10, 1947, from which no appeal was taken, nevertheless, "the intent was perfectly manifest and that must control" (R. 66, 67).

The Court also pointed out that although the notice of appeal described the bankruptcy receiver as the appellant, it declared that he was appealing on behalf of the bankrupt, and maintained that "since the Petroleum Conversion Corporation, though bankrupt, could take the appeal, as a step quite outside the bankruptcy proceeding, it was free to be represented by an attorney of its choice" (R. 67). In this important respect, the decision is grounded upon the thesis that Petroleum Conversion Corporation itself took the appeal.

The opinion below rests upon the further ground that it was within the power of the bankruptcy court to allow the four creditors at their own cost to prosecute the appeal (R. 67).

The Court below overruled in silence the points made by petitioner that the purported appeal by the temporary receiver was a nullity because (1) he was not a party to the

record; (2) his capacity to act as such receiver was limited to the district within which he was appointed and no ancillary receivership had been obtained by him in the Southern District of New York where said notice of appeal was filed; and (3) that Petroleum Conversion Corporation never authorized or approved said appeal. Similarly the Court below failed to hold, contrary to petitioner's contention, that the decree of April 10, 1947 was, as to Petroleum Conversion Corporation, a consent decree and therefore unappealable.

Reasons Relied on for Allowance of Writ

1. The decision below in so far as it is based upon *Clark* v. *Taylor* runs counter to long established precedents both of this Court and various Circuit Courts of Appeal. As Frank, C. J. there said in his dissenting opinion, in *Clark* v. *Taylor*, 163 Fed. 2d 940, 944, 947:

> "I dissent because this decision has marked precedential significance (since I think it overrules many decisions of the Supreme Court, of this Court, and of other Circuit Courts) * * *".
>
> "* * * (M)y colleagues are here, I think, overruling a long line of decisions (rendered both before and since the adoption of the Rules)".

See also point 8 of the dissenting opinion at page 949. And at page 950, he said:

> "Accordingly, the decision here, because of its precedential significance for many future litigants,*

* The 1948 amendment of Rule 54(b) of the Federal Rules of Civil Procedure of course does not affect the finality of the 1947 judgment in this case, nor does it resolve the future aspects of the matter; on this both the majority and the minority opinions in the *Clark* case are agreed, (163 F. 2d at 944 fn. 7; at 951 fn. 12; 952), since the Rules are effective only upon the District Courts and do not affect the appellate jurisdiction of the Courts of Appeal. And the Court below concurred, for otherwise it would not have stressed its circumspect invitation that certiorari be here granted.

> has an importance which transcends the injury it does the parties to the present suit. Inconsistent as it is with our previous decisions and with those in other circuits, it deserves and I hope that it will receive the attention of the Supreme Court."

This Court is respectfully referred to Judge Frank's extensive collation and detailed analysis of the authorities.

It is noteworthy that the opinion below refers to *Clark* v. *Taylor* as a "first decision" (R. 66) and that a majority of the total number of judges who participated both in the *Clark* case and in the instant case, have found that conclusion in the *Clark* case to be erroneous. In recognition of that fact and clearly to enable repudiation of that authority, it is submitted the Court below went as far as it reasonably could go in suggesting that certiorari be granted (R. 66, 67). The majority opinion in the *Clark* case also recognizes the need for a decision by this Court upon the issue (163 F. 2d 940, 943 fn. 4, where in discussing some of the cases relied on in the dissenting opinion, it is said: "Not all these exceptions are clear" and "Here, too, a definite rule is to be desired").

2. The Court below failed to recognize that the judgment of April 10, 1947 was, as to Petroleum Conversion Corporation, a consent decree which reason and the unanimity of authority holds unappealable.

3. The decision below sanctions an appeal by one not a party to the record; it thereby flies in the face of at least the following adjudications by this Court: *Ex parte Cutting*, 94 U. S. 14; *Ex parte Leaf Tobacco Board of Trade*, 222 U. S. 578, 581; *United States* v. *Jack*, 244 U. S. 397.

4. This matter presents questions of recurring importance in the administration of the Bankruptcy Act,

which either have not been finally settled or were decided by the Court below contrary to the probable effect of the decisions of this Court and the applicable provisions of the Bankruptcy Act.

A. There is no authoritative decision by this Court, so far as our research has revealed, with respect to the extraterritorial capacity of a receiver in bankruptcy in the absence of ancillary receivership. In so far as the decision below countenances the capacity of a Delaware bankruptcy receiver to file a notice of appeal in behalf of the bankrupt, in the Southern District of New York, it controverts the manifest purpose of Bankruptcy Act §69c (11 U. S. C. A. §109c) and General Order 51 (11 U. S. C. A. §53) which provide for ancillary receiverships (See *In re Benedict*, 140 Fed. 55); and the rationale of such decisions as *Moore* v. *Mitchell*, 281 U. S. 18, 24.

B. The decision below to the extent that it holds that a bankruptcy receiver, without intervention or substitution, becomes by the mere fact of his appointment, a party to law suits in which the bankrupt asserts a claim, conflicts with such cases as

Meyer v. *Fleming*, 327 U. S. 161;
Herndon v. *Howard*, 9 Wall. 664;
Knox v. *Exchange Bank*, 12 Wall. 379;
Johnson v. *Collier*, 222 U. S. 538;
Western Star Lodge v. *Burkes Construction Co.*, 5 Cir., 267 Fed. 550.

C. The Court below, by its decision recognizes the validity of a notice of appeal by a bankruptcy receiver

subscribed neither by the receiver nor his attorney (see Federal Rules of Civil Procedure, Official Form 27) but by the attorney for the bankrupt, despite non-compliance with General Order 44 (11 U. S. C. A. §53). See *In re: Rogers-Pyatt Shellac Co.*, 2 Cir., 51 F. 2d 988.

D. The decision below gives approval to the order of the referee in bankruptcy allowing four creditors at their own cost to prosecute the appeal. That order was made on the authority of Bankruptcy Act §64a(1) (R. 40, 41, 60, 61) although that section by its very language is applicable solely to creditors' actions to recover property fraudulently transferred or concealed by the bankrupt. And even if valid, the referee's order was insufficient *per se* to endow the four creditors and their attorney with standing in the Court of Appeals to prosecute an appeal therein or oppose the motion to dismiss. That required said creditors to become parties to the record by intervention or substitution and to subject themselves to liability for costs.

5. The procedure adopted by the Court of Appeals below in shifting to this Court the determination of whether *Clark* v. *Taylor* should be repudiated, presents a matter of fundamental importance in the administration of justice. Petitioner has been denied an adjudication to which the merits of his motion entitled him, even according to the opinion below.

The Court below chose not to pass on this precedent, established by fellow judges of the same Court, which it itself deemed not binding, and erroneous in its application to the instant case, expressly upon the chance that such precedent would be reviewed by this Court in consequence

of this application. The decision thus was, in substance, merely *pro forma*, to advance the matter to this forum. It is submitted that the Court of Appeals so far departed from the accepted and usual course of judicial proceedings as to call for exercise by this Court of its power of supervision.

Wherefore petitioner respectfully prays that this petition should be granted.

ALBERT G. DICKINSON,
Petitioner,
by SOLOMON KAUFMAN,
Attorney for Petitioner.

Of Counsel:
SAMUEL HERSHENSTEIN.

IN THE

Supreme Court of the United States

October Term—1948

No.

ALBERT G. DICKINSON,
Petitioner,

against

PETROLEUM CONVERSION CORPORATION.

BRIEF IN SUPPORT OF PETITION

Opinion Below

The opinion of the Court of Appeals for the Second Circuit (R. 62) filed on March 31, 1949 is reported at 173 Fed. 2d 738.

Jurisdiction

The jurisdiction of this Court is invoked under Title 28, United States Code, Section 1254 (1).

Statement of the Case

The facts have been set forth in the foregoing petition.

Specification of Errors

It is submitted that the court below erred:

(1) in denying petitioner's motion to dismiss the purported appeal by the receiver in bankruptcy of Petroleum Conversion Corporation;

(2) in failing to hold that the judgment of April 10, 1947, dismissing the claims of Petroleum Conversion Corporation on the merits, was final, at least as to it, and that by its failure to appeal therefrom within the statutory period it lost any right of review;

(3) in failing to hold that an appeal from the decree of April 10, 1947, by or on behalf of said corporation is precluded by its undisputed consent thereto;

(4) in failing to hold that the appeal by said receiver in bankruptcy was a nullity;

(5) in failing to hold that said corporation's creditors and their attorney had no standing to oppose petitioner's motion to dismiss the appeal;

(6) in shifting to this court the determination of whether a non-binding precedent should be repudiated, without itself determining the issue on the merits.

SUMMARY OF ARGUMENT

POINT I

The judgment of April 10, 1947 was final and appealable since it determined all of the fundamental questions involved in the action and settled the substantial rights of all the parties; it in fact disposed of every issue with respect to every party before the court; the subsequent proceeding provided for in said decree did not look to any modification thereof, but rather to its implementation.

POINT II

Even if not final as to all parties, the judgment of April 10, 1947, dismissing Petroleum Conversion's counterclaim on the merits after trial was, as to it, final and appealable; *Clark* v. *Taylor* is not in point and erroneous.

POINT III

Appeal from the judgment of April 10, 1947 by or on behalf of Petroleum Conversion Corporation is precluded by its consent thereto.

POINT IV

The purported appeal by the receiver in bankruptcy of Petroleum Conversion Corporation is a nullity since:

(A) The notice of appeal sought review only of the 1948 judgment which in no way aggrieved Petroleum Conversion Corporation;

(B) The appellant-receiver, appointed outside the district where the notice of appeal was filed, and having failed to obtain ancillary receivership, was without capacity to commence or prosecute said appeal;

(C) The receiver, named in the notice of appeal as the appellant, was not a party to the record and judgment appealed from;

(D) The notice of appeal was not subscribed by the receiver, the appellant named therein, or his attorney, but by the attorney for the bankrupt, disqualified to act for the receiver and unauthorized by the bankrupt to institute said appeal.

POINT V

The bankrupt's creditors, authorized by the referee's order to prosecute the appeal, and their attorney, nevertheless had no standing to oppose petitioner's motion to dismiss the appeal, since:

A. Bankruptcy Act, §64a(1), the express basis for the referee's order, is by its very language inapplicable; and

B. Said creditors did not by intervention or substitution become parties to the record or the judgment appealed from.

POINT VI

The Court of Appeals below failed to discharge its judicial responsibility by expressly shifting to this Court the decision of whether an admittedly non-binding and erroneous precedent should be repudiated, and by making a *pro forma* decision, in order to advance the matter to this forum, thereby depriving petitioner of a decision to which the merits of his motion entitled him, even according to the opinion below.

ARGUMENT

POINT I

The judgment of April 10, 1947 was final and appealable since it determined all of the fundamental questions involved in the action and settled the substantial rights of all the parties; it in fact disposed of every issue with respect to every party before the court; the subsequent proceedings provided for in said decree did not look to any modification thereof, but rather to its implementation.

An examination of the judgment of April 10, 1947 reveals that it fully determined the merits of every claim which had been asserted in the action (R. 23, 62). Nothing of substance was left. Petroleum Conversion Corporation thereafter had no further interest in or ground for participation in the litigation. All that remained to be done was to enable absent members of the successful class to intervene to secure their respective shares in the amount which the trial court, by said judgment, had already determined was due to the class. These further proceedings merely implemented the judgment. Under such circumstances, it is submitted even under the most conservative definition of a final judgment for the purposes of appeal, said judgment was final and appealable. *Collins* v. *Miller*, 252 U. S. 364, 370.

The mere fact that the decree of April 10, 1947 was not the ultimate judgment in the action, does not of course mean that it was not a final decision for the purposes of appeal within the meaning of Judicial Code §128 (now 28 United States Code §1254). *Reeves* v. *Beardall*, 316 U. S. 283.

Even if a decree does not, like that of April 10, 1947, dispose of every issue with respect to every party then before the Court, it is deemed final and appealable where it adjudicates the fundamental questions in the action and settles the substantial rights of the parties. *Ex parte Norton*, 108 U. S. 237; *Winthrop Iron Co.* v. *Meeker*, 109 U. S. 180; *In re: The Farmers' Loan and Trust Co.*, 129 U. S. 206; *Carondelet Canal & Navigation Co.* v. *Louisiana*, 233 U. S. 362.

The provisions for further proceedings in the 1947 judgment did not affect its finality since they were designed merely to implement the judgment and related to a matter entirely separable from the dismissal of Petroleum's claim; and, contrary to the court below (R. 65) it matters not that the implementation is not solely ministerial. *Forgay* v. *Conrad*, 6 How. 201; *Trustees* v. *Greenough*, 105 U. S. 527; *Thomson* v. *Dean*, 7 Wall. 342; cases cited *supra*, last preceding paragraph.

Thus, in *U. S.* v. *River Range Co.*, *supra*, 269 U. S. 411, 414, it is said:

> "And so, conversely, an adjudication, final in its nature as to the general subject of the litigation, may be reviewed without awaiting the determination of a separate matter affecting only the parties to such particular controversy."

In *Thomson* v. *Dean*, 7 Wall. 342, a decree, providing for further proceedings to adjust the accounts between the parties pursuant to the decree, was nevertheless held final. The Court stressed (at p. 345): "It looks to no future modification or change of decree."

Hill v. *Chicago & Evanston R.R. Co.*, 140 U. S. 52, is apposite. There, the decree dismissed the bill for want of equity against all but one of the defendants; and held

him liable as to one item which was referred to a master to ascertain the amount due complainant. The complainant appealed from that decree but that appeal was dismissed for failure to perfect. Complainant thereafter appealed from the decree based on the master's report. *Held*, that the original decree was final.

Equally apropos is *Lewisburg Bank* v. *Sheppey*, 140 U. S. 445. That was an action to restrain the bank and a trustee under a deed of trust, given to secure grantor's notes held by the bank, from selling the land. Complainants held a subsequent deed to the property, given for the benefit of grantor's creditors, which was recorded ahead of the bank's deed. The first decree held that title was in complainants but provided for sale of the property, the proceeds to be held for distribution. The second decree provided for distribution *pari passu* to grantor's creditors including the bank. The bank appealed from the second decree claiming it was entitled to priority. *Held*, the first decree was final.

A fortiori the decree of April 10, 1947, was final since the matters therein reserved for future proceedings not only did not concern Petroleum Conversion Corporation, but related solely to the claims of persons then not even parties to the action. Indeed, it was not necessary for such then absent parties to intervene in this spurious class action in order to assert their separate and independent rights. *York* v. *Guaranty Trust Co.*, 143 Fed. (2d) 503, 529 (C. A. 2), reversed on other grounds, 326 U. S. 99. A spurious class action is only a permissive joinder device and each claim in the class, even for appeal purposes, is deemed individual and distinct. *California Creators* v. *Weider of California*, 162 Fed. (2d) 893 (C. A. 2); *Gibbons* v. *Equitable Life Ass. Society*, 173 Fed. (2d) 537 (C. A. 2). There was no certainty that

the absent members of the class would intervene, and in fact, not all did (R. 36, 37).

Patently, the outcome of such proceedings whereby the absent members of the class could intervene and assert their claims to what had already been decided was theirs could not in any way alter the determination in the decree of April 10, 1947 dismissing Petroleum Conversion Corporation's claims on the merits.

POINT II

Even if not final as to all parties, the judgment of April 10, 1947, dismissing Petroleum Conversion's counterclaim on the merits after trial was, as to it, final and appealable; *Clark* v. *Taylor* is not in point and erroneous.

Rule 54(b) of the Federal Rules of Civil Procedure as it stood at the time of the 1947 decree, provided for a separate final judgment in an action involving multiple claims where there had been a determination of the issues material to a "particular claim" and all counterclaims arising out of the transaction or occurrence upon which it was based, though other claims stood undetermined (*Reeves* v. *Beardall*, 316 U. S. 283). That Petroleum's claim was a "particular claim" within said Rule 54(b) and the dismissal thereof on the merits was a final judgment is not affected by the pendency of the adverse claim of the Rinke Agency Subscribers, for even if the doctrine, as construed by the Court below (R. 66) of *Clark* v. *Taylor*, 163 F. 2d 940 (discussed, *supra*, pp. 11, 12) apply, no comparable "central core of facts" forming the basis of both of the rival claims here exists (R. 4 par. 4; R. 5 par. 6).

The dismissal of Petroleum Conversion Corporation's claim necessarily required consideration of substantial relevant evidence on the merits in addition to that relevant to the merits of the claim of the Rinke Agency Subscribers, and for this reason the dismissal was a final and appealable decision. *Zarati S. S. Co.* v. *Park Bridge Corp.*, 154 Fed. (2d) 377 (C. A. 2, 1946). In essence, the bases of each of said claims are different and they each constitute "a separate unit of judicial action". *Reeves* v. *Beardall*, 316 U. S. 283, 285. In the *Clark* case there was only one chose in action involved; the dispute between the rival claimants was only as to which of them had the title thereto.

And *Clark* v. *Taylor* is clearly distinguishable on even more basic grounds. In that case nothing was decided as to the merits of the claim itself, whereas here the rival claims were adjudicated on the merits after trial by the 1947 judgment. The absence of a decision on the merits was, contrary to the construction of the Court below (R. 65), a fundamental factor in determining the result in the *Clark* case. The majority opinion there emphasized (163 F. 2d at 942):

> "Upon this record it seems to us that this is a case of suit by the appropriate government official against two rival claimants to the same fund or chose in action, and that *there will be a final judgment only when there is a decision as to the existence and ownership of the property in dispute. The conclusion that a fiduciary claiming to represent one of the claimants to the dispute does not have formal legal title to the assets in question is not a final judgment upon the important and central point in dispute.* * * *" (Italics supplied.)

And again at page 943:

> "Here the central fact concerns the royalties collected by ASCAP for AKM and by AKM for ASCAP and the legality and fact of offset between them. That AKM's right or title may have devolved to Propper (the state court receiver) does not change or lessen the importance of this question." (Matter within parenthesis added.)

The majority in the *Clark* case regarded the dispute between the Alien Property Custodian and the state court receiver as to who shall prosecute the claim against ASCAP on behalf of AKM as merely a "preliminary skirmish" (p. 944). This characterization could hardly be applied in the instant case to the resolution by trial of the issues on the merits as reflected by the 1947 judgment. The criterion of the *Clark* case as to the finality of a judgment that there shall have been a determination of "the important and central point in dispute", "a decision as to the existence and ownership of the property in dispute" points toward the conclusion that the 1947 judgment was final and appealable, at least to Petroleum.

The relationship of the instant case to the *Clark* case is not unlike that of *State of Texas* v. *Chuoke*, 5 Cir., 154 F. 2d 1, cert. den. 329 U. S. 714, to the earlier case of *Catlin* v. *United States*, 324 U. S. 229. In the *Catlin* case the preliminary *ex parte* judgment in a condemnation proceeding, vesting title in the United States, and the denial of a motion to vacate such judgment and the petition seeking condemnation, on the ground that the petition showed on its face that the taking was for an unauthorized purpose, were held to lack finality and hence appealability until full adjudication on the merits. This Court noted that *Dade County* v. *United States*, 5 Cir., 142 F. 2d 230, had held in accord (324 U. S. at 233, fn. 6). But the

Fifth Circuit Court of Appeals, with two of the same judges as in the *Dade County* case sitting, thereafter held in the *Chuoke* case, *supra*, that where the land has already been taken by the Government and the amount of compensation fixed, a judgment that a claimant had no title to part of the land was final and appealable although other controversies arising out of the condemnation had not been fully determined. The analogy to the case at bar is obvious.

Assuming, however, that *Clark* v. *Taylor* is in point, it is submitted that the decision there is erroneous and that the exhaustive dissenting opinion in that case so demonstrates, conclusively. Certainly we could not write a better brief on the question. This Court is therefore respectfully referred thereto for a marshalling of the authorities establishing that "In divers circumstances, it has often been held that an order is final and appealable which shuts out one claimant to assets (tangible or intangible) although the claims of others, not of joint character with the barred claim, remain undetermined"* (163 F. 2d at 946). Petitioner need not go even that far to sustain his position since in his case the decree after trial which "shut out" Petroleum did not leave "undetermined" the rival claim of the Rinke Agency Subscribers; quite the contrary, it determined that they were entitled to recover and fixed the amount of the recovery.

* In accordance with this principle, the court below concurred in the reasoning that, since Petroleum Conversion Corporation would have been obligated to appeal from an order denying its right to intervene in this action, it can not be successfully maintained that it was not so obligated to appeal from a decree dismissing its claims on the merits after trial even if it be assumed that the decree was not final as to the Rinke Agency Subscribers (R. 65).

POINT III

Appeal from the judgment of April 10, 1947 by or on behalf of Petroleum Conversion Corporation is precluded by its consent thereto.

A decree may be entered under such circumstances that consent thereto may be inferred, and an appeal thereby precluded. *U. S.* v. *Babbitt*, 104 U. S. 767; *Nashville, etc. Ry. Co.* v. *U. S.*, 113 U. S. 261, 266; *Pacific R.R.* v. *Ketchum*, 101 U. S. 289;* *Curry* v. *Curry*, 79 Fed. (2d) 172 (App., D. C.)

In the case at bar, the facts (*supra*, pp. 6, 7) demonstrate that from the very beginning Petroleum Conversion Corporation and the representatives of the Rinke Agency Subscribers contemplated that they would jointly present their claims to the trial court and that its determination, if in favor of either of them, would be satisfactory to both. In consequence, the entry of the decree in favor of the class upon the motion of the attorney for the corporation as well the attorney for the class is equivalent to the corporation's formal consent thereto.

* In *Pacific R.R.* v. *Kitchum*, the court affirmed a decree because appellant's solicitors had consented thereto, though it refused to dismiss the appeal on that ground. But there appellant claimed lack of actual consent creating a question of fact which could not be decided on a motion to dismiss. *Swift & Co.* v. *United States*, 276 U. S. 311, 324. Here the facts demonstrating consent as set forth in the moving affidavit (R. 3, 6 & 7) are undisputed, even in the opposing affidavit (R. 41).

POINT IV

The purported appeal by the receiver in bankruptcy of Petroleum Conversion Corporation on its behalf, is a nullity.

A. The notice of appeal sought review only of the 1948 judgment which in no way aggrieved Petroleum Conversion Corporation.

Rule 73(b), F. R. C. P. provides that the notice of appeal "shall designate the judgment or part thereof appealed from; * * *."

The only decree "designated" in the notice of appeal is that of August 3, 1948 which does not determine any of the claims of Petroleum Conversion Corporation and merely awards to the members of the alleged class of Rinke Agency Subscribers, amounts totaling $408,949.57.

The April 10, 1947 decree is not "designated" (R. 38). It must therefore follow that said notice of appeal is a nullity since the decree to which it refers does not aggrieve the appellant and the decree which dismissed the appellant's claim is not specified therein. *French* v. *Jeffries*, 161 Fed. (2d) 97, 99 (C. C. A. 7, 1947).

This is not an instance of where a mere detail in the notice of appeal needs correction; or of an inadvertent error. Here the notice cites an existing and correctly identified decree; indeed, it goes further, it specifies the particular paragraphs thereof (R. 38).

The Court below erred by, in effect, transmuting the appeal from the decree of August 3, 1948 into an appeal from the decree of April 10, 1947. *State of Missouri* v. *Todd*, 122 Fed. (2d) 804, 807 (C. C. A. 8, 1941).

B. The appellant-receiver, appointed outside the district where the notice of appeal was filed, and having failed to obtain ancillary receivership, was without capacity to commence or prosecute said appeal.

A bankruptcy receiver is without capacity to act where appointed in some other district. *In re: Benedict*, 140 Fed. 55 (D. C., E. D., Wisc., 1905); see *In re: Kaufman*, 21 Fed. (2d) 799 (D. C., S. D., N. Y.). His appointment has no extraterritorial effect. *Moore* v. *Mitchell*, 281 U. S. 18, 24; *Booth* v. *Clark*, 17 How. 327; *Hale* v. *Alinson*, 188 U. S. 56. In order to have capacity to act within a district other than that of his appointment, the receiver must be appointed as an ancillary receiver. Bankruptcy Act, §69 (c), 11 U. S. C. A., §109 (c) and General Order #51, 11 U. S. C. A., §53 foll., providing for ancillary receiverships, would otherwise be meaningless. Here no ancillary receivership was obtained (R. 7).

C. The receiver, named in the notice of appeal as the appellant, was not a party to the record and the judgment appealed from.

Rule 73, F. R. C. P. provides in part "a party may appeal from a judgment by filing with the District Court a notice of appeal * * *. The notice of appeal shall specify the parties taking the appeal; * * *". As this court has said "one who is not a party to a record and judgment is not entitled to appeal therefrom. *Bayard* v. *Lombard*, 9 How. 530; *Indiana* v. *Liverpool, London & Globe Ins. Co.*, 109 U. S. 168; *Ex parte Cockraft*, 104 U. S. 578." *Ex parte Leaf Tobacco Board of Trade*, 222 U. S. 578, 581. In accord: *United States* v. *Jack*, 244 U. S. 397, 400; *Ex parte Cutting*, 74 U. S. 14; *Orpheum Corp.*, 70 Fed. (2d) 621 (C. A. 2, 1934).

A receiver in bankruptcy is merely an officer of the court and represents neither the bankrupt nor his creditors; he is nothing more than a custodian. 8 C. J. S., §150, p. 587. Not even a bankruptcy trustee becomes, by the mere fact of his appointment, a party to lawsuits in which the bankrupt is a plaintiff. A trustee may decline to prosecute an action instituted by bankrupt if he believes that it will not benefit the estate. Intervention or substitution in place of the bankrupt is not mandatory. *Meyer* v. *Fleming*, 327 U. S. 161, 165; *Danciger* v. *Smith*, 276 U. S. 542; *Johnson* v. *Collier*, 222 U. S. 538; *In re Prudence Co.*, 96 Fed. 2d 157 (C. A. 2). Intervention or substitution is required to make a trustee, and certainly a receiver, a party to the action. *Western Star Lodge* v. *Burkes Construction Co.*, 267 Fed. 550 (C. C. A. 5, 1920). Such intervention or substitution is the recognized course of procedure for prosecution of an appeal by a trustee. *Herndon* v. *Howard*, 9 Wall. 664 (1896); *Knox* v. *Exchange Bank*, 12 Wall. 379 (1870).

In absence of such intervention or substitution, the appeal may be prosecuted by the bankrupt. *Sanford* v. *Sanford*, 58 N. Y. 67; *Schoonmaker* v. *Pittsburgh Contracting Co.*, 176 App. Div. 48, 161 N. Y. Supp. 186. Here Petroleum Conversion Corporation at no time took an appeal or authorized an appeal on its behalf (R. 7, par. 12, subd. 6).

It therefore follows that the appeal taken by Petroleum Conversion Corporation's temporary receiver in bankruptcy is meaningless since he was not a party to the action.

D. The notice of appeal was not subscribed by the receiver, the appellant named therein, or his attorney, but by the attorney for the bankrupt, disqualified to act for the receiver and unauthorized by the bankrupt to institute the appeal.

The notice of appeal in question was subscribed by the attorney for Petroleum Conversion Corporation as such (R. 39). He was not authorized to act for the appellant named in the notice of appeal, the temporary receiver. On the contrary, he was clearly disqualified to so act. General Order #44, 11 U. S. C. A., foll. §53 (R. 7, par. 12, subd. 4). *In re Rogers-Pyatt Shellac Co.*, 2 Cir., 51 F. 2d 988.

To this contention the Court below answers that "Since the Petroleum Conversion Corporation, though bankrupt, could take the appeal, as a step quite outside the bankruptcy proceeding, it was free to be represented by an attorney of its choice" (R. 66). But this is entirely beside the point. The underlying premise is erroneous. Petroleum Conversion Corporation, though it could, did not in fact take or authorize this appeal (R. 7, par. 12, subd. 5). This is undisputed (R. 41). Petroleum Conversion Corporation while "free to be represented by an attorney of its choice" made no such choice to be represented in said appeal. It in no way appeared or participated therein. It had decided not to appeal from the dismissal of its claims (R. 6). The Court below was clearly in error as to these fundamental facts.

The conclusion is still valid that the notice of appeal was a nullity because it was not subscribed by the appellant named therein but by an attorney who did not and could not represent him. (See Official Form 27, following Federal Rules of Civil Procedure.)

POINT V

The bankrupt's creditors, authorized by the referee's order to prosecute the appeal, and their attorney, nevertheless had no standing to oppose petitioner's motion to dismiss the appeal.

Prior to petitioner's motion to dismiss (R. 1, *et seq.*) the trustee in bankruptcy for Petroleum Conversion Corporation had declined, for reasons detailed in his report to the Referee (R. 58), to prosecute the appeal commenced by him as receiver, and such declination had been approved by the Referee without objection by any of the creditors (R. 61). Notice of said motion was given to the attorney for Petroleum Conversion Corporation and the attorneys for the various subscribers as well as the attorney for defendant Lloyd's Estate (R. 2). Notice of said motion was also given to Alexander Kahan, Esq. as the attorney for the trustee in bankruptcy (R. 2) by reason of the fact that he had so described himself in his immediately preceding motion for an extension of time to perfect said appeal (R. 49, 51).

The sole opposition to the motion to dismiss the appeal came from Mr. Kahan; Petroleum Conversion Corporation did not appear (R. 62).

Mr. Kahan, whose previous maneuver to get into the case by a motion for leave to intervene on behalf of certain Petroleum Conversion Corporation preferred stockholders was thwarted by the District Court (R. 56, R. 60), derives his claim of right to appear in opposition to the motion to dismiss solely from the Referee's order permitting four named creditors "by their attorney and

attorney-in-fact, Alexander Kahan, Esq." to prosecute said appeal (R. 47).*

Petitioner challenges the validity of said order, and even if valid, its effectiveness to create *per se* a status in the appeal for Mr. Kahan and his real clients, the four creditors authorized to prosecute the appeal.

A. Bankruptcy Act §64a(1), the express basis for the referee's order, is by its very language inapplicable.

Bankruptcy Act §64a(1), 11 U.S.C.A. 104a(1), provides in so far as is here material:

> "Debts which have priority. a. The debts to have priority, in advance of the payment of dividends to creditors and to be paid in full out of bankrupt estates, and the order of payment shall be (1) * * * where property of the bankrupt transferred or concealed by him either before or after the filing of the petition shall have been recovered for the benefit of the estate of the bankrupt by the efforts and at the cost and expense of one or more creditors, the reasonable costs and expenses of such recovery * * *."

This language is too clear to require argument. Patently its scope, and the inferential power of the Bankruptcy Court thereunder to authorize prosecution of litigation for the benefit of the estate, is limited to

* The order does not authorize Mr. Kahan to act as attorney for the trustee, contrary to his assertion (R. 52); that would require compliance with General Order 44, 11 U.S.C.A. §53 foll. On the other hand, it does purport to substitute him "as the attorney for appellant, Petroleum Conversion Corporation, upon the said appeal" (R. 47, 49). However, his motion to effect such substitution (R. 43, 44, subd. 3) was denied (R. 68, fol. 96; 69, fols. 97, 98) and significantly, the introduction to the opinion below carefully but conspicuously omits describing for whom Mr. Kahan appeared in opposition to the motion to dismiss the appeal (R. 62, fol. 87).

creditors' actions to recover property fraudulently transferred or concealed *by the bankrupt*. The bankrupt in such an action would be a defendant; not, as in the case at bar, a virtual plaintiff, seeking a judgment for breach of fiduciary duty.

The authorities are in accord. The ambit of Section 64(a) is not to be extended beyond the confines of its language; the enumeration therein of instances for its application excludes all others. *In re First Bond and Mortgage Co.*, 5 Cir., 74 F. 2d 930, 932; *Southern Bell T. and T. Co. v. Caldwell*, 8 Cir., 67 F. 2d 802; *James Butler Grocery*, D. C. N. Y., 22 F. Supp. 998, aff'd 2 Cir., 100 F. 2d 376, 378.

And the implicit recognition by this statute of the power of the court to authorize creditors' actions for the benefit of the estate is restricted to suits for the recovery of property transferred or concealed by the bankrupt. 3 Collier on Bankruptcy §64.104 p. 2066.

The court below therefore erred in approving the order of the referee authorizing the prosecution of the appeal in the case at bar (R. 67), and such invalid order could not give said creditors or their attorney status to oppose petitioner's motion.

B. Said creditors did not by intervention or substitution become parties to the record or the judgment appealed from.

The intent of the Referee's order (R. 47) that the creditors authorized to prosecute the appeal should become parties thereto is plainly evident from the following:

> (1) the provision in the order that such prosecution shall be without liability on the part of the Bankrupt Estate for any costs, fees or expenses, unless successful;

(2) the absence of any provision for any bond or other security to be furnished by the creditors to insure that the estate will be held harmless from any such liability; an obvious precaution, if the creditors were not to be actual parties;

(3) the reference to Bankruptcy Act §64a(1) which applies only to suits wherein the creditors are themselves the parties.*

The creditors, of course, could not and did not become parties to the appeal in the Second Circuit Court of Appeals by virtue of the order by the Delaware referee in bankruptcy, particularly since it was merely a permissive order. An order of said Court of Appeals, allowing such substitution or intervention was required. *Western Star Lodge v. Burkes Constr. Co.*, 5 Cir., 267 Fed. 550. Absent such substitution or intervention, the said creditors and their attorney lacked status to oppose petitioner's motion to dismiss, (1) for lack of compliance with the implied conditions of the referee's order and (2) they had not become parties to the record and judgment appealed from and were therefore strangers to the appeal. (See *supra*, p. 33.)

* True, the order provides that the said appeal shall be prosecuted in the name of the bankrupt and the trustee for the benefit of the bankrupt. But manifestly that was only to insure that the recovery in action, if any, would accrue to the estate; the order lacks any other provision for such protection to the estate; a bond, considering the sum involved, would have imposed too onerous a burden.

The provision under consideration is consistent with the intervention by the creditors as parties to the appeal. Its effect in the light of the order as a whole is that the prosecution of the appeal is to be in the name of the bankrupt and the trustee, for the benefit of the bankrupt estate, by the named creditors, as in an action on behalf of an infant by a guardian *ad litem*, or on behalf of an incompetent by his conservator or committee. Then the creditors' attorney could act in his true capacity.

POINT VI

The Court of Appeals below failed to discharge its judicial responsibility by expressly shifting to this Court the decision of whether an admittedly non-binding and erroneous precedent should be repudiated and by making a *pro forma* decision, in order to advance the matter to this forum, thereby depriving petitioner of a decision to which the merits of his motion entitled him, even according to the opinion below.

Unquestionably, the Court below, if it would have decided this matter on the merits in accordance with the conclusions and convictions of the judges on the bench, the decision would have been in favor of the petitioner here (R. 64 to 66). The sole reason why the petitioner was deprived of a decision on the merits is that the Court itself failed to repudiate a precedent established by brother judges despite the fact, as the opinion below itself points out, that it was not an authoritative precedent and that it conflicted with the convictions of the judges who heard this matter (R. 66). Instead, the Court expressly shifted to this Court the question whether the said precedent should be repudiated (R. 66), a question which was clearly before it, but which it failed to determine on the merits. What the Court, in substance, did was to enter a *pro forma* order denying the motion and simultaneously, in effect, invite the granting of a writ of certiorari so as to have this Court resolve the issue (R. 66).

Under these circumstances, it is respectfully submitted, it can reasonably be said that the decision below was not a "responsible exercise of the judicial process" (*Helvering*

v. *Hallock*, 309 U. S. 106, 119). The Court failed to discharge its duty to decide the issues properly before it on the merits according to law, 14 Am. Jur., §48, and to repudiate a non-binding precedent, which the Court was convinced was erroneous. *F. B. Vandergrift & Co.* v. *United States*, 3 Cir., 173 F. 609. What was said in *Stas* v. *Rochester Railway Co.*, 18 App. Div. 506, 507, 46 N. Y. Supp. 582, 593, app. dism. 159 N. Y. 567, 54 N. E. 1094, is particularly apt:

> "* * * Under our present system of judicature it is designed that this court shall be the ultimate tribunal in cases of this character, and it would be doing violence to the plain intent of that system to render a *pro forma* decision merely for the purpose of advancing the case to another forum * * *"

The evident departure by the Court below from the usual and accepted standards for the discharge of judicial responsibility requires, it is submitted, the exercise by this Court of its supervisory powers.

CONCLUSION

A writ of certiorari should be granted.

Dated, New York, June 22, 1949.

Respectfully submitted,

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IN THE

Supreme Court of the United States

October Term, 1949

No. 150

ALBERT G. DICKINSON,
Petitioner,
against
PETROLEUM CONVERSION CORPORATION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

REPLY BRIEF

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IN THE

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October Term, 1949

No. 150

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against

PETROLEUM CONVERSION CORPORATION.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

REPLY BRIEF

The significance of the brief in opposition lies not in what it says, but what it finds itself unable to say. Thus, it in no way disputes our statement of the facts, (Pet. pp. 5-9) or our analysis of the decision below (Pet. pp. 9-14). It does not challenge the reasoning or the authorities upon which are based Points I and II of our brief. As to our Points III to XI inclusive, it conspicuously fails even to attempt an answer. If the tactic be to effect disparagement by silence, it is patently born out of the impotency of countervailing argument, for what briefer would exchange the equivocation of silence for the efficacy of sound analysis?

In one respect opposing counsel acknowledges, by his conduct, the validity of one of our basic positions. Our Point V establishes that Mr. Kahan is without status to oppose our motion to dismiss (Brief, pp. 36-39) and that his self-description as attorney for the trustee in bankruptcy of Petroleum Conversion Corporation is unsanctioned (Brief, p. 9). Accordingly, he now shifts his position and subscribes his brief as "Attorney for Petroleum Conversion Corporation, Bankrupt" (p. 12). But this description recklessly disregards the record. J. Harlan O'Connell, Esq. was and still is the attorney for the respondent (R. 6, 15, 24, 39) and as such, has been served with, and he has admitted service of, the petition and supporting brief herein. Mr. Kahan's motion to be substituted for Mr. O'Connell as attorney for Petroleum Conversion Corporation was denied by the court below (R. 68, 69) and the time within which to seek a review of such denial has expired.*

Additional urgent reasons make this reply brief necessary. (1) The brief in opposition relies chiefly on a point not even considered by the court below and thus was not treated in our main brief; (2) its contentions in a number of instances are predicated upon material mistatements of facts, particularly as to matters dehors the record; and finally (3) the authorities cited by the brief in opposition are not in point. These defects are so interwoven in the fabric of the opposing brief that it is awkward to consider them separately.

---

* As the motion for substitution itself tacitly admits, the order of the referee in bankruptcy designating Mr. Kahan as attorney for the bankrupt, is not *per se* sufficient to effect that result. Manifestly, such an order cannot affect the record status of an attorney in another court and in another proceeding. Furthermore, nothing in the Bankruptcy Act authorizes the referee to appoint an attorney for the bankrupt, without the bankrupt's consent.

The main opposing contention involves all of the defects mentioned. Mr. Kahan's brief devotes most of its "Summary Statement of the Matters Involved" (Brief, pp. 2, 3), a large part of its Point I (pp. 9, 10), and its Point III (pp. 11, 12) in a strenuous endeavor to prove that entry and notice of judgment pursuant to Rule 77d of the Federal Rules of Civil Procedure were complied with by the Clerk of the District Court only in regard to the decree of August 3, 1948 and that therefore the decree of April 10, 1947 was unappealable. To begin with, the facts as to compliance with said Rule 77d do not appear in the record; and no effort was made to have them included. Mr. Kahan's determined effort to raise this issue now bears mute but eloquent testimony that he deems the decision below inadequately sustained by its stated grounds, and that it requires a prop, albeit without foundation in the record. But the effort is futile, as a matter of fact and of law. In order to lay at rest any doubt as to the merits of this contention, we are taking the liberty, and indeed, we are required by the necessity of the situation, to step outside of the record and point out that notice and entry complying with said Rule 77d were given not only with respect to the decree of August 3, 1948 but also as to that of April 10, 1947. The district clerk's docket entry therefor states:

> "Apr 10 1947 Filed Final decree determining rights to stock, etc.—(see decree)—Leibell, J. Mailed notice of entry 4-11-47"

Moreover, *Hill* v. *Hawes*, 320 U. S. 520, upon which our opponent's contention in this respect is based (see brief, p. 9), held merely that non-compliance with Rule 77d tolled the running of the period for appeal until notice of entry

of the judgment was sent to appellant's counsel. Here notice of the entry of the April 10, 1947 decree was not required to start the running of the period for appeal by Petroleum Conversion Corporation since said decree was entered on the motion of its attorney as well as the attorney for the Rinke Agency Subscribers (R. 23, 24).

Other misstatements of fact which permeate opponent's brief include the assertions (1) that the Findings of Fact and Conclusions of Law below were "approved by all counsel" (Brief in opp. p. 3). Besides this is a matter outside of the record; (2) that "The trial court explicitly left and reserved" in the April 10, 1947 decree "for subsequent determinaion after hearings before the court, the question of the full amount of the judgment * * *" (Brief in opp., p. 6). On the contrary, said decree explicitly sustained the claim on behalf of the Rinke Agency Subscribers in the total sum of $176,245.24 with interest as therein set forth from various dates in 1926 (R. 27) for which, in fact, the judgment of August 3, 1948 in the sum of $408,949.57 was entered (R. 30); (3) similarly, that the April 10, 1947 decree made no "determination of the existence and ownership of the claims of the various Subscribers of the Rinke Agency" (Brief in opp. p. 9). The decree actually determines that such claims did exist and were owned by the Subscribers of the Rinke Agency or their successors in interest. It merely left for subsequent proceedings the matter of their identification and the assertion of their respective rights to share in the recovery. (4) The quotation from the memorandum decision rendered by the trial court on March 16, 1948 is no part of this record and obviously was improperly included by Mr. Kahan in his "Summary Statement of the Matters Involved" (brief p. 3). Moreover, the quotation was mere

dictum; the decision denied Mr. Kahan's application, (at that time, in behalf of preferred stockholders) to intervene so as to be enabled to appeal in behalf of Petroleum Conversion Corporation the decision held on the ground that if the decree was not final the time to appeal by the corporation had not expired; if final, it had long since expired. Further, the trial court cast grave doubt upon the *bona fides* of the application.

Let us now consider the authorities cited by our opponent. *Zimmerman* v. *U. S.*, 298 U. S. 167, is a mainstay of the opposition. But that case is clearly inapplicable. There it was held that the decree after trial was deprived of finality by the order of the trial court extending the term in order to make changes therein under his power to modify or revoke his judgment for error of fact or law. In the instant case, the April 10, 1947 decree was in no way subsequently modified; rather the decree of August 3, 1948 and the proceedings upon which it was based, were not only in harmony with the April 10, 1947 decree but actually carried out its terms. Even more to the point is the fact that the dismissal of respondent's claims by the April 10, 1947 decree was in no respect affected by the later proceedings or the decree of August 3, 1948.

Similarly, *Leishman* v. *Associated Wholesale Electric Co.*, 318 U. S. 203 deals only with the effect of a motion pursuant to Rule 52b of the Federal Rules of Civil Procedure, to amend and supplement the findings, upon the finality of a proceeding judgment. This case, if it has any force here, tends to favor petitioner since the opinion specifically stresses that said motion contemplated alteration of rights already adjudicated (318 U. S. at 205). It was for this reason that the court held that the finality

of such judgment was suspended pending disposition of the motion.

Suggs v. *Mutual Benefit Health & Acc. Ass'n*, 10 Cir., 115 Fed. (2d) 80, is precisely like the *Leishman* case.

Kuhn v. *Canteen Food Service*, 7 Cir., 150 Fed. (2d) 55 is based on *Hohorst* v. *Hamburg-American Packet Co.*, 148 U. S. 262, and holds only that, where the *defendants* are jointly charged, dismissal as to some of them is not a final decree. It is quite the contrary of the dismissal on the merits of one of two adverse interveners' claims, as here. See *Clark* v. *Taylor*, diss. op., 163 F. 2d 940, 944, 948.

Korematsu v. *U. S.*, 319 U. S. 432 is totally unrelated to the matter at hand. It held that an order of the District Court placing a convicted defendant on probation without imposing sentence was a final decision despite the general rule that "final judgment in a criminal case means sentence".

In *Allen B. Wrisley Dist. Co.* v. *Serewicz*, 7 Cir., 158 F. (2d) 721, the order settled but one of numerous issues; there is no analogy to the decree here of April 10, 1947 which determined all the issues before the court, including the dismissal of all of respondent's claims.

Craighead v. *Wilson*, 18 How. 199 is likewise beside the point. There heirs in an accounting action sought to recover part of decedent's property; the decree merely determined their heirship and their relative rights in the succession. In other words, it established their right to an accounting—a typical interlocutory decree. It did not establish their right to any recovery. That, as the very quotation cited by Mr. Kahan indicates (Brief, p. 5), depended *inter alia* upon the balancing of the equities, determination of what had been expended on the property,

and what had been received by the claimants, all of which required adjudication by the Master appointed by the decree for that purpose.

Catlin v. *U. S.*, 324 U. S. 329 is considered in our main brief (p. 29). Its principal point is that in that case there was no adjudication on the merits by the decree in question. Here the dismissal of Petroleum Conversion Corporation's claim on the merits and, in fact, the disposition of every other issue before the court by the decree of April 10, 1947 stands in sharp contrast.

CONCLUSION

A writ of certiorari should be granted.

Respectfully submitted,

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IN THE

Supreme Court of the United States

October Term—~~1948~~ 1949

No. 150

ALBERT G. DICKINSON,
Petitioner,

against

PETROLEUM CONVERSION CORPORATION.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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IN THE

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No.

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against

PETROLEUM CONVERSION CORPORATION.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Petroleum Conversion Corporation by its Trustee in Bankruptcy, respectfully prays that a writ of certiorari be not issued to review an order of the United States Court of Appeals for the Second Circuit, entered March 31, 1949, denying petitioner's motion to dismiss the Trustee's appeal, on behalf of said Petroleum Conversion Corporation, Bankrupt, from a judgment of the District Court, for the Southern District of New York entered August 3, 1948, in the action entitled "Albert G. Dickinson, plaintiff, against Arthur W. Rinke, et al., defendants, Petroleum Conversion Corporation, E. Lewis Burnham and James A. Vaughan, et al., interveners."

Summary Statement of the Matters Involved

Two decrees were entered by the District Court, one decree dated April 10, 1947 and the other, the final decree, dated August 3, 1948. Petroleum Conversion Corporation served a Notice of Appeal from the final decree and judgment of August 3, 1948, which final decree was made the judgment in said action in accordance with Rules of Civil Procedure 77 (d) and bore the following endorsement at the end thereof,

> "Judgment Rendered William V. Connell Clerk August 3rd, 1948."

and it also had attached to it the following endorsement:

"Office of the Clerk
District Court of the United States
Southern District of New York
United States Courthouse New York, N. Y.

New York City August 3, 1948
Dickinson
Rinke

Docket No. Eq. 86-366

Pursuant to Federal Rule of Civil Procedure No. 77 (d) notice is hereby given of the entry on Aug. 3, 1948 of a judgment in the above proceeding.

WILLIAM V. CONNELL,
Clerk"

The final decree of August 3, 1948 in addition to being called "final decree" also contained the following provision:

> "3. That the issues reserved in the decree herein dated the 10th day of April, 1947, having been de-

> termined by the Court in its decision and opinion and its Findings of Fact and Conclusions of Law filed herein dated the 24th day of July, 1948, the said decree is hereby made final."

The Findings of Fact and Conclusions of Law submitted and approved by all counsel and signed by the Trial Court (District Court) in support of the final decree of August 3, 1948, refers in the first paragraph thereof to the decree of April 10, 1947 as an interlocutory decree. Numerous opinions and decisions filed by the Trial Court in the instant case referred to the decree of April 10, 1947 as interlocutory.

In a memorandum decision rendered by the Trial Court on March 16, 1948, which decision was not appealed from and is therefore the law of the case on this point, in denying a motion for intervention by preferred stockholders of Petroleum Conversion Corporation, referred to the decree of April 10, 1947 in the following language and stated that it was an interlocutory decree and not appealable,

> "Petitioners charge that no appeal was taken by Petroleum Conversion Corporation from the interlocutory decree of April 10, 1947. In my opinion it was not a final decree and was not appealable, at least in so far as it involved the claim for $176,000."

SUMMARY OF ARGUMENT

POINT I

Petroleum Conversion Corporation could appeal only from the final decree of August 3, 1948 and not from the decree of April 10, 1947 because the latter decree was not final. An appeal from the decree of August 3, 1948 automatically included an appeal from the earlier decree of April 10, 1947 as well.

The provisions of the Federal Code of Civil Procedure, as well as the decisions in the numerous cases of the Supreme Court of the United States and the Circuit Courts, clearly bar an appeal from an order such as the decree of April 10, 1947.

Section 1291 of the new United States Code of Judiciary and Judicial Procedure states that the jurisdiction of the Court of Appeals is "from all final decrees of the District Courts of the United States. * * *"

Section 1292 of the new United States Code of Judiciary and Judicial Procedure defines the jurisdiction of the Court of Appeals in the case of interlocutory decisions and limits it to four categories, none of which are applicable to the case at bar. For the sake of brevity we shall not enumerate these four categories, since they are not applicable to the decree of April 10, 1947, constantly referred to by the Trial Court as "Interlocutory decree."

It might be stated parenthetically that these two sections of the new United States Code of Judiciary and Judicial Procedure substantially incorporate into statute law what case law had previously held to be the law of the United States Courts.

We will not attempt to overwhelm this Court with citations as did our adversaries in their brief, but would like

to call the Court's attention to several of the leading United States Supreme Court and Circuit Court of Appeals cases such as *Zimmern* v. *United States*, 298 U. S. 167; 80 L. ed. 1121; *Leishman* v. *Associated Wholesale Electric Co.*, 318 U. S. 203; *Toyosaburo Korematsu* v. *United States*, 319 U. S. 432; *Hill* v. *Hawes*, 320 U. S. 520; *Clark* v. *Taylor*, C.C.A. Second Circuit 1947 (163 Fed. (2d) 940); *Suggs* v. *Mutual Ben. Health and Accident Association*, C.C.A. Tenth Circuit 1940 (115 Fed. (2d) 80); *Kuhn* v. *Canteen Food Service*, C.C.A. Seventh Circuit 1945 (150 Fed. (2d) 55); *Allen B. Wrisley Distributing Co.* v. *Serewicz*, C.C.A. Seventh Circuit 1946 (158 Fed. (2d) 721).

The United States Supreme Court, in the early case of *Craighead* v. *Wilson*, 18 Howard 199 enunciated a rule, which is still the rule of the United States Courts, as expressed in the aforementioned provisions of Sections 1291 and 1292 of the new United States Code of Judiciary and Judicial Procedure. The following succinct language, used by Mr. Justice McLean in that case in 1856, is coincidentally and peculiarly applicable to the case at bar:

> "The above cases are sufficient to show the grounds on which appeals in chancery are dismissed. To authorize an appeal, the decree must be final in all matters within the pleadings, so that an affirmance of the decree will end the suit. To apply this test, in all cases, cannot be difficult.
>
> In no legal sense of the term is the decree now before us a final one. The basis of the decree, embracing the equities in the bill, is found, but the distribution among the parties in interest depends upon the facts to be reported by the master. It is his duty, under the interlocutory decree to balance the equities, by ascertaining what has been expended on the property, and what has been received by each of the claimants; and also every other matter which should have a bearing and influence

> in the distribution of the property. Until the court shall have acted upon this report and sanctioned it, giving to each of the devisees his share of the estate under the will, the decree is not final."

The Trial Court decided and incorporated in the decree of April 10, 1947 the basis of the equities, namely, that the petitioner was guilty of many kinds of fraud and deceit against the corporation and also found that the Rinke Agency, one of the intervenors-appellees, in a representative capacity, was entitled to a recovery against the plaintiff-appellant (petitioner), for the wrongs to the corporation; but the Trial Court explicitly left and reserved for subsequent determination after hearings before the Court the question of the full amount of the judgment, the names of the numerous individuals represented by the Rinke Agency to whom the judgment should be paid and the amounts to be paid to each of these individuals as well as other important matters. This part of the case required the taking of further testimony of upwards of eight hundred pages and the introduction of many additional exhibits. Even the subscription agreements themselves of the individuals whom the Rinke Agency represented were not legally determined insofar as the rights of these individuals were concerned and the dollar amount and extent of their participating interests, until after the hearings following the decree of April 10, 1947.

The Trial Court in its decree of April 10, 1947, also provided for the subsequent entry of judgment, taxation of costs and many other steps necessary before this decree would in effect become a final decree, an appeal from which would completely terminate the case as would meet the requirements of the rules of this Court.

Mr. Justice Cardozo in the case of *Zimmern* v. *United States of America*, *supra*, at page 169, points out a num-

ber of acts which the District Court in that case reserved for a subsequent decree and which thereby made the first decree not appealable because of lack of finality.

> "We think the decision misapprehends the effect of the order of May 11, 1934, in which the judge who had tried the cause declared himself dissatisfied with the decree that he had made, and to give himself an opportunity to make the necessary changes extended the term then drawing to a close. He did not limit the amendment to matters of form only as distinguished from those of substance. He did not act so far as the record shows, at the instance of the defendants, still less upon a showing of error in only one particular. He stated broadly and, for all that appears, of his own motion that changes must be made, and without a word to indicate whether he meant them to be great or little. We think the effect of that order was to suspend the operation of the decree so that no appeal could be taken from it until it had been amended or confirmed, and its vigor thus restored. Until such action had been taken it was no longer a decree at all. The judge had plenary power while the term was in existence to modify his judgment for error of fact or law or even revoke it altogether. Doss *v.* Tyack, 14 How. 297, 313, 14 L. ed. 428, 435; Basset *v.* United States, 9 Wall. 38, 41, 19 L. ed. 548, 549; Bronson *v.* Schulton, 104 U. S. 410, 415, 26 L. ed. 797, 799; Henderson *v.* Carbondale Coal & Coke Co., 140 U. S. 25, 40, 35 L. ed. 332, 338, 11 S. Ct. 691. Finality was lacking until his choice had been announced."

At the end of the report of this case in 80 L. ed. at page 1121 there appears a compilation of cases in the United States Courts as well as in many of the States Courts, supporting the rule.

The further acts which the Trial Court left for future determination to be adjudicated and included in the final

decree most certainly amount to "amendments, modifications or further acts," as set forth in the herein quoted decisions and cited cases and which prevent an appeal from the Trial Court's earlier decree of April 10, 1947, under the doctrine of finality.

Mr. Justice Rutledge in a later case, *Catlin* v. *United States of America*, 324 U. S. 229, at pages 233 and 234 strongly reiterated the doctrine of finality in the following language:

> "Their right to appeal rests upon §128 of the Judicial Code. This limits review to 'final decisions' in the District Court. A 'final decision' generally is one which ends the litigation on the merits and leaves nothing for the court to do but execute the judgment. St. Louis, I. M. & S. R. Co. *v.* Southern Exp. Co., 108 U. S. 24, 28, 27 L. ed. 638, 639, 2 S. Ct. 6. * * *
>
> * * * The foundation of this policy is not in merely technical conceptions of 'finality'. It is one against piecemeal litigation. 'The case is not to be sent up in fragments. * * *' Luxton *v.* North River Bridge Co., 147 U. S. 337, 341, 37 L. ed. 194, 195, 13 S. Ct. 356. Reasons other than conservation of judicial energy sustain the limitation. One is elimination of delays caused by interlocutory appeals."

Mr. Justice Augustus N. Hand in a very succinct opinion of June 22, 1948 also affirmed this rule in *United States* v. *Braunstein* (C.C.A. 2nd Circuit 1948), 168 F. 2nd 749. So too does Mr. Justice Clark in the case of *Clark* v. *Taylor, supra,* at page 942 in the following language:

> "Upon this record it seems to us clear that this is the case of suit by the appropriate government official against two rival claimants to the same fund or chose in action, and that there will be a final judgment only when there is a decision as to the

existence and ownership of the property in dispute."

In the case at bar, one of the elements which was still lacking in order to make the decree of April 10, 1947 final was the determination of the existence and ownership of the claims of the various subscribers of the Rinke Agency. The interest of the interveners-appellees, Rinke Agency, and the Petroleum Conversion Corporation itself, were conflicting. The latter had no way of taking an appeal from an interlocutory decree which had not even been reduced to judgment. The judgment was not and could not be entered until a final decree was made herein, because the names of the persons in whose favor the judgments were to be entered and the amounts of their respective judgments were not to be determined until after the April 10, 1947 decree and in fact were not determined until the August 3, 1948 decree.

We have already pointed out that the technical requirements as to entry and notice of judgment pursuant to Section 77 (d) of the Federal Rules of Civil Procedure were complied with only in connection with the decree of August 3, 1948 which was the final decree and the only decree from which Petroleum Conversion Corporation could appeal. The Trial Court and all the parties thereto also called this the final decree. The Supreme Court of the United States has held that this technical requirement is important in determining the finality of the decree in the case of *Hill* v. *Hawes, supra,* at page 523, in the following language:

"It is true that Rule 77 (d) does not purport to attach any consequence to the failure of the clerk to give the prescribed notice; but we can think of no reason for requiring the notice if counsel in the cause are not entitled to rely upon the requirement that it be given. It may well be that the effect

> to be given to the rule is that, although the judgment is final for other purposes, it does not become final for the purpose of starting the running of the period for appeal until notice is sent in accordance with the rule."

Without in any way attempting to distinguish the numerous cases cited in our adversaries' brief, we cannot possibly see how any of these cases can change the basic law as it is enunciated above both by statute and case law and by the Trial Court itself in its decision, quoted from on page 3, *supra*.

We cannot fathom the attempted explaining away by our adversaries of the case of *Collins* v. *Miller*, 252 U. S. 364. We respectfully quote the following language from that case at page 370:

> "Second: A case may not be brought here by appeal or writ of error in fragments. To be appealable the judgment must be not only final, but complete. * * * (Many cases cited.) And the rule requires that the judgment, to be appealable, should be final not only as to all the parties, but as to the whole subject-matter and as to all the causes of action involved. * * * (Cases cited.)"

POINT II

The United States Court of Appeals for the Second Circuit in its opinion filed on March 31, 1949, 173 Fed. 2nd 738, in the instant case, regarded the entire litigation as a whole as the controversy, not the series of mutual rights and liabilities which had arisen out of it.

The Court under this point in relying upon *Clark* v. *Taylor*, *supra*, to support its holding in the instant case stated in part as follows:

> "* * * On the other hand, we cannot find any tenable distinction between the situation at bar and

that which was before the court in Clark *v.* Taylor, where we dismissed the appeal. It is true that the interlocutory judgment in that case had not decided anything as between the plaintiff and Taylor, the president of the A.S.C.A.P.; in which regard it was different from the judgment of April tenth, 1947, which did decide that Dickinson and Lloyd were liable to the 'Rinke Agency Subscribers,' and what was the limit of that liability. But we do not understand that the majority in Clark *v.* Taylor, supra, went upon any such distinction; on the contrary they regarded the 'transaction,' the 'occurrence' as a whole, as the controversy, not the series of mutual rights and liabilities which had arisen out of it; and they held that until all these had been determined, no appeal lay, however, finally any part of those rights and liabilities might be disposed of. It was only in case 'transactions' or 'occurrences' wholly disconnected were coupled, as the Rules permitted, that separate appeals could be taken. That case was decided only after the greatest deliberation, and the opinions then rendered contain all that can be said in support of either view. It appears to all three of us in the present court most undesirable to repudiate a precedent so established. * * *"

POINT III

The United States Court of Appeals for the Second Circuit in its opinion in the instant case was correct when it held that the judgment of April 10, 1947 was not final as to Petroleum Conversion Corporation and was therefor not appealable and that by its failure then to appeal it lost no rights of review or conversely Petroleum Conversion Corporation properly appealed from the only final judgment in the case dated August 3, 1948.

The transcript of record submitted by the petitioner has omitted in Exhibit D at pages 30 through 37, the

endorsement appearing on the final decree and judgment dated August 3, 1948. Whether this omission was deliberate or an oversight matters little, but it is an extremely important omission and consequently the within brief at page 2 contains a detailed statement of said endorsement.

CONCLUSION

A writ of certiorari should be denied.

Dated, New York, July 12th, 1949.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM—1949.

No. 150 150

ALBERT G. DICKINSON,

Appellant,

against

PETROLEUM CONVERSION CORPORATION,

Respondent.

RESPONDENT'S SUPPLEMENTAL BRIEF.

ALEXANDER KAHAN,
Attorney for Petroleum Conversion Corporation, Bankrupt, Respondent,
60 Broad Street,
New York, N. Y.

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POINT I.

The Decree of April 10, 1947 was interlocutory. It was neither final nor complete, and hence not appealable. The appeal taken from the final decree of August 3, 1948 automatically included an appeal from the earlier decree of April 10, 1947.

The within appeal comes before this court on two certified questions. The first of the questions is as follows:

> **"Where two rival claimants each sought the recovery of a particular sum from other parties to the action and judgment after trial, entered in 1947, dismissed on the merits one of said claims and granted recovery in a fixed amount to the other claimant, a spurious class, and provided for judgment apportioning said recovery to members of the class after opportunity to absent members to intervene and claim their respective shares, and all other issues in the action were disposed of by said 1947 judgment, and the unsuccessful claimant failed to appeal therefrom within the statutory period, is its receiver in bankruptcy nevertheless entitled to a review of said 1947 judgment, dismissing its claim on the merits, by an appeal from the 1948 judgment apportioning the recovery to members of the class constituting the successful claimant?"**

At the outset it should be noted that in the first of these questions presented for this court's determination, the appellant has erroneously made reference to a 1947 judgment. Careful examination of the record fails to disclose that any judgment was ever entered in this action in 1947. True it is that an interlocutory decree was entered on April 10, 1947, from which no appeal was taken, but

no judgment was directed to be nor was a judgment ever entered on this decree and it was not until after the entry of the final decree on August 3, 1948 that the only judgment in the action was entered. In fact, the interlocutory decree of April 10, 1947 specifically defers the entry of judgment (R. 29) until the determination of certain matters reserved in that decree. Exactly why the appellant chose to refer to this decree as a judgment is not entirely clear, unless it was done for the purpose of bolstering his claim that this decree was final and should have been appealed from. The first certified question, therefore, directly raises the issue as to whether the interlocutory decree of April 10, 1947 was a final judgment and consequently appealable.

The policy of this court, as well as that of most of the courts of this country, has always been to allow an appeal only from a final decree, order or judgment. Logic dictated the continuance of such a policy. To permit otherwise would bring about a multiplicity of appeals and create inordinate delays and unlimited confusion. Despite this general principle upon which most of the courts seem to agree, questions have always arisen as to what constitutes "final" and does "final" always mean "final". The treatment of this subject has usually taken the form of a statement of the rule "only a final judgment can be appealed from", followed by definitions of what constitutes a final judgment, of which one has usually had to take one's choice, depending upon the result to be reached. This court has said:

> "Probably no question of equity practice has been the subject of more frequent discussion than the finality of decrees. * * * The cases, it must be conceded, are not altogether harmonious." *McGourkey* v. *Toledo & Ohio Central*, 146 U. S. 536.

However, out of the welter of inharmonious decisions on this subject there arises what to us seems to be a clear pattern. Where a decree, order or judgment is tentative, informal or incomplete, where any matter remains open, unfinished or inconclusive, no appeal can be taken. The courts have recognized that in order for a judgment to be final and accordingly appealable, there must in addition to finality be completeness. Not only must all of the rights of the various parties be determined, but in addition all of the matters in controversy as a whole must be disposed of.

In the interlocutory decree of April 10, 1947 the court clearly recognized that it was neither final nor complete. Among other things, the court directed the holding of a hearing four months after the date of the entry of the interlocutory decree, and further directed that notice of the hearing be given, among others, to the Petroleum Conversion Corporation (fol. 37). Had it been the intention of the court to make the interlocutory decree of April 10, 1947, final as to the Petroleum Conversion Corporation, what then would have been the necessity of directing the giving of notice of the hearing to the Petroleum Conversion Corporation? It seems to us that if there was nothing else in the entire case, that fact without more, taken directly from the decree itself, completely demolishes the appellant's position that this decree was a final judgment. But we need not rest on that fact alone. If the interlocutory decree of April 10, 1947 was a final judgment and complete as to the Petroleum Conversion Corporation, the District Court would have directed the entry of a judgment disposing of Petroleum Conversion Corporation's claims and terminating the entire litigation insofar as Petroleum Conversion Corporation was concerned. The fact is, how-

ever, that the District Court did nothing of the kind. It neither completely disposed of the action, nor even all the Petroleum Conversion Corporation's claims, nor did it direct the entry of judgment thereon, but in fact reserved certain matters for future consideration, which required the giving of further notice to Petroleum Conversion Corporation.

> "A decree where a cause is held for further direction, is not a final decree, reviewable on appeal." *Railroad Company* v. *Swasey*, 23 Wall. 405.

Furthermore, the direction contained in the decree deferring the taxation of costs is merely another example of the lack of finality and completeness of the decree of April 10, 1947, which rendered it unappealable. In *Wheeler* v. *Harris*, 13 Wall. 51, this court held:

> "A decree of the Circuit Court where costs are to be taxed is not final, and an appeal from it premature. A formal decree should be entered after taxation and appeal taken from that."

Where a litigation contains claims or counterclaims of various claimants, the trial court can in some instances dispose of some of the claims with finality and completeness without disposing of all the claims. Had the court in the instant case considered it possible to do this, it would have directed the entry of judgment disposing of the numerous claims of the Petroleum Conversion Corporation in accordance with the provisions of Rule 54 (b) of the Rules of Civil Procedure of the District Courts of the United States. This procedure would have had the effect of a severance. Since no such direction was contained in the interlocutory decree of April 10, 1947 and since no judgment was so entered, it is apparent on the face of the interlocu-

tory decree itself that it was neither complete nor final, and hence not appealable. It is further apparent from the reading of the several decrees herein that the court recognized its inability to sever the action. It is equally apparent that the court had no intention of doing any such thing and appellant's strenuous efforts to characterize the court's intentions in that regard are entirely erroneous and unfounded and contrary to fact and law.

There is no question and the District Court so held that the decree of April 10, 1947 was interlocutory and, therefore, not appealable.

In the case of *Cobbledick* v. *United States*, 309 U. S. (decided February 26, 1940), Mr. Justice Frankfurter, who wrote the opinion, said at pages 324 and 325:

> "* * * Finality as a condition of review is an historic characteristic of federal appellate procedure. It was written into the first Judiciary Act and has been departed from only when observance of it would practically defeat the right to any review at all. Since the right to a judgment from more than one court is a matter of grace and not a necessary ingredient of justice, Congress from the very beginning has, by forbidding piecemeal disposition on appeal of what for practical purposes is a single controversy, set itself against enfeebling judicial administration. * * *"

The theory underlying the entire question of appealability of orders, is that the "transaction" or "occurrence" is the subject matter of a claim or claims rather than the legal rights arising therefrom. Additions to or subtractions from the central core of facts do not change the substantial identity of the "transaction" or "occurrence" so as to support piecemeal appeals. *Petrol Corporation* v. *Petroleum Heat & Power*, 162 F. 2nd, 327.

So we find in the instant case that the District Court's decision and its interlocutory decree of April 10, 1947, dismissing the claim of the Petroleum Conversion Corporation, did not meet the test established by rule and decision for finality and completeness, because while some of the rights and claims of the Petroleum Conversion Corporation might have been disposed of in the court's decision, the "transaction" or "occurrence" of all the causes of action, was not disposed of. To like effect we find that in the case of *Collins* v. *Miller*, 252 U. S. 366 (decided March 29, 1920), Mr. Justice Brandeis, who delivered the opinion of the court, said at page 370:

> "* * * and the rule requires that the judgment to be appealable should be final not only as to all the parties, but as to the whole subject matter and as to all of the causes of action involved. * * *"

The United States Court of Appeals for the Second Circuit, in denying the motion to dismiss respondent's appeal, clearly recognized this principle. While it agreed that some of the claims of Petroleum Conversion Corporation were disposed of in the interlocutory decree of April 10, 1947, it did not recognize that there was any distinction between the instant case and the case of *Clark* v. *Taylor*, 163 F. 2nd 940 (as revised October 15, 1947), previously decided by that court. In an exhaustive analysis the court pointed out that in reaching its decision in *Clark* v. *Taylor*, *supra*, it regarded the "transaction", the "occurrence" as a whole, as the controversy and not the series of mutual rights and liabilities which had arisen out of it; and it accordingly held that until all of these rights and liabilities had been determined, no appeal could be taken, however finally any particular right or liability might have been disposed of. Furthermore, they recognized that in cases

where "transactions" or "occurrences" wholly disconnected were coupled, separate appeals might be taken, but found that no such situation existed in the instant case.

The interlocutory decree of April 10, 1947 was but an incident in the litigation and was merely a step towards the final decree and judgment which were entered on August 3, 1948, and from which final decree and judgment the respondent's appeal was taken.

In the case of *Cohen* v. *Beneficial Industrial Loan Corporation* (decided June 20, 1949), Mr. Justice Jackson delivered the opinion of the court, and said at page 1225:

> "* * * So long as the matter remains open, unfinished or inconclusive, there may be no intrusion by appeal. * * *"

and again at page 1226:

> "Nor does the statute permit appeals even from fully consummate decisions, where they are but steps toward final judgment in which they will merge. The purpose is to combine in one review all stages of the proceeding that effectively may be reviewed and corrected if and when final judgment results. * * *"

To summarize, we find that the decree of April 10, 1947 was not a judgment, was not final, was not complete, was but an incident in the litigation and merely a step to the final judgment, and was solely and only for all purposes an interlocutory decree, and that the trial court intended and regarded it as such.

The entire litigation from its very inception, through to the final decree and judgment of August 3, 1948, entirely revolved around, with or against Petroleum Conversion Corporation. How then, could it be urged in any sense that the interlocutory decree of April 10, 1947 was a final judgment against Petroleum Conversion Corporation.

POINT II.

There was no consent, actual or implied, to the entry of the Interlocutory Decree of April 10, 1947, so as to preclude the appeal of the Petroleum Conversion Corporation.

The second of the two questions before this court is as follows:

> "Where a corporation intervenes in an action and pleads a claim against the plaintiff and one of the defendants for a particular sum of money based upon breach of fiduciary obligation and representatives of subscribers to the stock of said corporation simultaneously intervene and assert a claim for the same amount on behalf of the class on ground that the sum sought came out of funds belonging to said class, alleging, however, that either said class or the corporation was entitled to the recovery, and the action is tried on behalf of both the corporation and the class by a single counsel, the attorney for the corporation, and at the end of the trial both submitted a single brief and a single set of proposed findings and conclusions of law, both leaving it to the trial court to decide whether, if a recovery was to he had, to which of said claimants it should be awarded, and the decree, dismissing the claim of the corporation on the merits and sustaining the claim of the class and fixing the total recovery thereon, was entered on the joint motion of the attorney for the corporation and the attorney for the class, and the attorney for the class was an officer of and an attorney for the corporation, should the Court of Appeals have dismissed the appeal seeking review of said decree on behalf of the corporation by its receiver in bankruptcy, on the ground that the decree was a consent decree, it appearing that both the

corporation and the class had asserted and prosecuted their claims and jointly entered said decree on the basis that it was satisfactory to both if either recovered?"

We find that in the second of the two questions certified for determination by this court, the appellant has confused facts with inferences from facts. It has suited the purposes of the appellant to infer from certain facts that the Petroleum Conversion Corporation consented to the entry of the interlocutory decree of April 10, 1947, and now he would have it appear in wording and presenting the second question that these inferences are facts rather than his deduction from facts. Let us examine the facts.

It should be noted at this point that none of these facts appear in the record before this court, but inasmuch as the question has been presented by the appellant, it is incumbent upon us to answer it. The appellant points out that the decree of April 10, 1947 was entered on the joint motion of the attorney for the Petroleum Conversion Corporation and the attorney for the Rinke Agency Subscribers. That because the attorney for the Rinke Agency Subscribers was also an officer and attorney for the Petroleum Conversion Corporation, that this incident indicated that the Rinke Agency Subscribers and the Petroleum Conversion Corporation had identical interests, and that whether one or the other was successful was of no moment. Nothing could be further from the true situation. The interests of the Rinke Agency Subscribers and of the Petroleum Conversion Corporation were never identical. They were in fact in complete conflict. That the attorneys who represented the Rinke Agency Subscribers and the Petroleum Conversion Corporation did not recognize this fact does not change the ultimate and basic situation.

The fact that the attorney for the Petroleum Conversion Corporation improperly joined in the entry of the decree and the fact that the attorney for the Rinke Agency Subscribers was an officer and attorney of the Petroleum Conversion Corporation does not of itself make the interlocutory decree of April 10, 1947 a consent decree, and hence not appealable.

For a decree to be entered on consent there must be actual consent endorsed thereon and appearing on the face thereof. Nothing contained in the records indicates that there is or ever was such actual consent. It is conceivable that in many instances a decree or order or judgment may be entered upon the motion of a party who subsequently appeals from the very decree, order or judgment which he was responsible for having entered. Circumstances such as the failure of other parties in a litigation to enter a decree, judgment or order may compel such entry of judgment by a party who wishes to appeal without delay. The fact of the entry of judgment by such party does not thereafter preclude his appeal on the ground that the entry on his motion constitutes a consent. Nor can any consent be inferred from any of the other stated facts in the petition. As has been pointed out, consent to the entry of a judgment, decree or order must be actual and must appear on the face of the decree, judgment or order, to be effective as a consent.

Since there was no actual consent appearing either in the record of the trial, the interlocutory or final decrees or the judgment entered thereunder, there could be no effective bar to the appeal by Petroleum Conversion Corporation from the only judgment in the action entered on August 3, 1948. Furthermore, respondent is somewhat at a loss to understand how this entire question of consent incorporated by the appellant in his question number 2 and certified for review on this appeal, is germane to the issues involved. If

as the appellant contends the decree of April 10, 1947 was final as to this respondent, even if there had been consent, the question is rendered academic, because the time to appeal from such judgment had expired long before the service of a Notice of Appeal in behalf of Petroleum Conversion Corporation. Certainly if the respondent is correct in its contention that the decree of April 10, 1947 was interlocutory only, even if the respondent had consented to the entry of such interlocutory decree the respondent would not have been precluded from taking an appeal from the final decree and judgment entered on August 3, 1948, which it did.

The within brief is intended to be supplemental to respondent's brief heretofore filed in this court in opposition to appellant's application for Writ of Certiorari.

Conclusion.

The order of the Circuit Court of Appeals for the Second Circuit, denying appellant's motion to dismiss respondent's appeal, should be affirmed.

Respectfully submitted,

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Corporation, Bankrupt, Respondent.